FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR BERKOVICH v. HAPAG-LLOYD, A.G., HAPAG-LLOYD AMERICA, INC., LIMCO LOGISTICS, INC, AND INTERNATIONAL TLC, INC.	Docket No. 10-06

Served: May 26, 2015

BY THE COMMISSION: Mario CORDERO, *Chairman*; Richard A. LIDINSKY, Jr., *Commissioner*; and William P. DOYLE, *Commissioner*, concurring, in which *Commissioner* LIDINSKY joins; Rebecca F. DYE, *Commissioner*, dissenting; and Michael A. KHOURI, *Commissioner*, dissenting, in which *Commissioner* DYE joins.

Order Affirming Remand Initial Decision

The issues before the Commission in this Order are quite narrow, as this case has already been reviewed once before. The Shipping Act of 1984 directs that regulated entities "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). The question is what conduct Congress intended to make unlawful when it

prohibited the "fail[ure] to . . . observe, and enforce just and reasonable regulations and practices[.]"

With this Order, we resolve this and the remaining issues before the Commission, and highlight a few of the defects with the approach outlined by our dissenting colleagues.

I. INTRODUCTION

This proceeding was initiated by a complaint filed by Yakov Kobel and Victor Berkovich (collectively Complainants) with the Federal Maritime Commission (Commission) on July 6, 2010. Complainants alleged that Hapag-Lloyd A.G. and Hapag-Lloyd America, Inc. (collectively Hapag-Lloyd); Limco Logistics, Inc. (Limco); and International TLC, Inc. (ITLC) violated various sections of the Shipping Act, and Complainants sought reparations and other relief.

On February 14, 2012, the Administrative Law Judge (ALJ) issued an Initial Decision dismissing all of Complainants' claims against all Respondents with prejudice. *Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 512 (ALJ 2012). Complainants filed exceptions to the Initial Decision. The Commission issued an Order on July 12, 2013 (July 2013 Order), vacating the Initial Decision in part and remanding this proceeding to the ALJ for further adjudication as to whether ITLC and Limco violated section 10(d)(1) of the Shipping Act (46 U.S.C. § 41102(c)). *Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720 (FMC 2013).

The ALJ issued a Remand Initial Decision (Remand Decision) on July 30, 2014, holding that ITLC and Limco violated section 10(d)(1) of the Shipping Act and finding that they are jointly and severally liable to Complainants for a reparation award of $126,072. *Kobel v. Hapag-Lloyd A.G.*, 33 S.R.R. 594 (ALJ 2014). Respondents ITLC and Limco, respectively, filed exceptions to the Remand Decision. For the reasons stated below, the Commission affirms the ALJ's Remand Decision.

II. BACKGROUND

This proceeding arose out of problems associated with the transportation of Complainants' five containers from Portland, Oregon to Gdynia, Poland between April and July 2008. Two of the five containers were picked up by Complainants in Poland, but three containers were liquidated by ITLC and/or Limco between February and March 2009.

The ALJ's Initial Decision included "Findings of Fact," which were adopted by the Commission in its July 2013 Order. *Kobel*, 32 S.R.R. at 1724-1726. The ALJ's Findings of Fact will be cited herein as "Finding(s)."

III. DISCUSSION

A. ITLC

1. ITLC's Exceptions and Complainants' Reply.

In its exceptions, ITLC[1] states that "[b]ecause the Complainants' true grievances are based in tort or cargo loss/damage, the Commission lacks subject matter jurisdiction over this case." ITLC's Exceptions to Remand Decision (ITLC's Exceptions) at 3. ITLC alleges that Complainants' claims are causes of action under the Carriage of Goods by Sea Act (COGSA), which can only be adjudicated in Federal courts. It further argues that "breach of [ITLC's] fiduciary duty involving three containers in a single transaction is not a violation of section 10(d)(1) of the Shipping Act." *Id.* at 4.

[1] ITLC was not licensed by the Commission as either a freight forwarder or a non-vessel-operating common carrier (NVOCC) at the time of the dispatch of Complainants' shipments. ITLC was later licensed on July 24, 2008, as an NVOCC.

In their reply to ITLC's Exceptions, Complainants state that "[ITLC] did not have any written contract with Complainants and did not have contractual right to enforce any lien nor did it have Complainants' consent or authorization to sell the containers and change the bill of lading." Complainants' Reply at 3. Complainants further state that "ITLC's Exceptions fail to cite or even address any legal right or authority for it to sell Complainants' containers." *Id.* at 4. Complainants allege that "[t]he evidence supports a finding that ITLC, as a freight forwarder, breached its fiduciary duty to Complainants." *Id.*

2. ALJ is correct in determining that ITLC violated section 10(d)(1).

While ITLC alleges that Complainants' claims are "causes of action under [COGSA], which can only be adjudicated in Federal Court," ITLC's Exception at 3, the Commission has already determined that "Complainants' claims fall under the Commission's jurisdiction." *Kobel* (July 2013 Order), 32 S.R.R. at 1728. The Commission's jurisdiction over Complainants' claims was not an issue remanded to the ALJ. As the Commission stated in its July 2013 Order, "Respondents in this proceeding cannot avoid the Shipping Act issue by cloaking Complainants' claims in terms of COGSA." *Id.* The Commission concluded that Complainants' claims are "not for simple loss or damage to their cargoes, but for injuries caused by Respondents' alleged violations of the Shipping Act." *Id.* Therefore, the Commission affirmed the ALJ's holding that Complainants' claims fall under the Commission's jurisdiction.

ITLC also alleges that "a single transaction is not a violation of section 10(d)(1) of the Shipping Act." ITLC's Exceptions at 4. Even though ITLC liquidated Complainants' three containers at the same time, Complainants' claim involves three separate transactions. Limco, a non-vessel-operating common carrier (NVOCC), issued three separate house bills of lading, and Hapag-Lloyd, an ocean common carrier, also issued three separate master bills of lading. *Id.* at 1724. Each bill of lading represents a separate

contract of carriage and document of title. Therefore, Complainants' claim involves three separate transactions. Regardless, this issue was not remanded to the ALJ. The Commission determined in its July 2013 Order that a failure in connection with a single transaction can be a violation of section 10(d)(1) of the Shipping Act. The Commission stated that "[e]ven the failure in a single transaction can be a failure to observe and enforce a just and reasonable regulation and practice, and therefore, a violation of section 10(d)(1)." *Kobel*, 32 S.R.R. at 1730.

The ALJ found that "[t]here is no evidence that ITLC established just and reasonable regulations and practices for handling shipments for which they did not receive payment or that were not picked up timely. ITLC did not identify the legal basis for its liquidation of the three containers." *Kobel*, 33 S.R.R. at 600. Other than reiteration of unfounded assertions throughout this proceeding, ITLC has failed to show credible evidence that it had any legal basis to liquidate Complainants' three containers and the cargoes therein without Complainants' consent or authorization. As Complainants state in their Reply, ITLC does not even address this issue in its Exceptions. We agree with the ALJ's determination that Complainants have established that ITLC violated section 10(d)(1) of the Shipping Act.

B. Limco

1. Limco's Exceptions and Complainants' Reply.

In its exceptions, Limco states that "Limco's practice of accepting the instructions of the shipper's designated forwarder with respect to amendments to the bills of lading is reasonable." Limco's Exceptions to Remand Decision (Limco's Exceptions) at 3. Limco claims that "it would be impracticable for carriers to contact the shipper to confirm every instruction received from the shipper's forwarder, or to investigate on a case-by-case basis whether the shipper's designated agent and fiduciary is trustworthy or acting within the scope of its fiduciary obligations to the shipper." *Id.* at

11. Limco alleges that "[t]here is absolutely no evidence in the record to support a conclusion that Limco knew ITLC was acting improperly or adverse to the interests of Complainants when it requested that the bill of lading be amended." *Id.* at 12. Limco further claims that "there is no evidence in the record to support a finding that Limco knew that any liquidation by ITLC would be wrongful." *Id.* at 12-13. It alleges that "[s]ince . . . ITLC could have had enforceable lien rights against the cargo, there is no logical or rational basis for concluding that Limco should have known that any liquidation by ITLC would be wrongful." *Id.* at 16. Limco asserts that "[t]he interpretation of Section 10(d)(1) to impose strict liability for any failure to follow a reasonable practice essentially makes carriers guarantors of mistake-free service." *Id.* at 17. Finally, Limco asserts that "[s]ection 10(d)(1) should apply only to an unreasonable pattern of conduct or to conduct involving intentional malpractices rather than single or isolated acts that are in reality contractual disputes and can properly be addressed in a commercial forum." *Id.* at 18.

In their reply to Limco's Exceptions, Complainants state that "[t]he specific facts of this case are much different than the typical situation described in Limco's Exceptions where the NVOCC has no reason or knowledge that the freight forwarder is acting without actual or apparent authority of the shipper." Complainants' Reply at 9. Complainants allege that "the facts in this case placed Limco on notice that ITLC was acting adversely to its principal and therefore has a duty to make inquiry of the Complainants as to the freight forwarder's (ITLC) authority, especially when Limco had reasonable means to make such inquiry." *Id.* Complainants claim that "Limco . . . knew or should have known that ITLC was acting for its own benefit and not Complainants when it liquidated the three containers but failed to make reasonable inquiry." *Id.* at 10.

Complainants further allege that "Limco advocates, in essence, for immunity from violation of Section 10(d)(1) under any circumstances if it follows any requests to change a bill of lading from a freight forwarder." *Id.* Complainants assert that with respect

to one of the three liquidated containers, Complainants did not even receive any notice of liquidation. *Id.* at 15. Complainants further assert that considering the testimony of Limco's and ITLC's personnel, "both Limco and ITLC were more concerned about recovering payment of shipping fees and moving the containers than whether or not ITLC had a lawful right to liquidate these containers or whether the liquidation was performed in a commercially legal manner." *Id.* at 17. Regarding Limco's claim of ITLC's enforceable lien right, Complainants state that Limco's contention is based purely on speculation and not on evidence, and ITLC did not present any facts to support an inference of any legal right to sell the containers at any stage in the proceedings. Complainants further claim "[t]he record is devoid of any evidence of any legal right, contractual right or otherwise, to justify the liquidation." *Id.* Finally, regarding Limco's claim of strict liability, Complainants argue that a violation of section 10(d)(1) does not impose strict liability, or make a carrier a guarantor of mistake-free service, as suggested by Limco. Complainants state that a complainant must prove either a failure to establish just and reasonable regulations and practices or prove a failure to observe and enforce just and reasonable regulations and practices in each case. Complainants further state this is not the same as imposing strict liability for any injuries that arise in a shipment. *Id.* at 19.

2. Evidence supports the ALJ's conclusion that Limco violated section 10(d)(1).

The ALJ found that in December 2008 and January 2009, Limco and ITLC communicated on an almost daily basis regarding Complainants' three containers. *Kobel*, 33 S.R.R. at 602 (citing Transcript at 742). The ALJ stated that Limco knew that ITLC was considering liquidating the containers, and also knew that ITLC, as the freight forwarder, had a fiduciary duty to the Complainants. *Id.*

The ALJ's findings are supported by the evidence. When asked whether he had discussions with Limco prior to selling the three containers, ITLC president Mr. Barvinenko testified that "I

notified [Limco], and I also asked [Limco] if they have somebody over there who would be interested just to conduct a preliminary research." *Id.* (citing Transcript at 387). When asked whether Limco participated in planning the sale, he further testified that "[w]ell, [Limco] was notified. [Limco] knew that containers would be sold." *Id.* (citing Transcript at 389). The ALJ found that "[t]he evidence from Limco also demonstrates notice of the liquidation." *Id.* at 603. We agree with the ALJ's findings.

The evidence demonstrates Limco's knowledge of irregularities in connection with the shipments. Limco's president, Mr. Lyamport, testified that "there was a lot of going back and forth with the customer, with Mr. Berkovich and International TLC in regards to trying to settle on the payment from their side." *Id.* (citing Transcript at 736). When asked about discussions with ITLC prior to changing the bills of lading, he also testified that:

> Well, we had numerous discussions about these, all these containers. And it was, yes, a big discussion every – almost every day at this time . . . . And basically International TLC had made – had made a move to find out – find a way to resolve the situation and provide us with instructions, new instructions how to change name of the shipper, the consignee in order to get the cargo moving out of – out of the port.

Id. (citing Transcript at 742-44). When asked about discussions regarding the liquidation sale, Mr. Lyamport answered that "[w]e – we – we had the discussion with International TLC to get our payment – to get paid and get the containers picked up . . . ." *Id.* (citing Transcript at 747). In particular, when asked about the liquidation of the damaged container, Mr. Lyamport testified that "we heard that [ITLC was] trying to liquidate it and have it sold to another party because there was – there were numerous attempts made by International TLC *to collect . . . the money on their – on the shipment*." *Id.* (emphasis added) (citing Complainants' Exhibit 78 at 19).

Mr. Lyamport's statements demonstrate that Limco most likely knew that the sale was improperly initiated by ITLC, not by Complainants. The testimony strongly indicates Limco knew that ITLC was liquidating the container for its own interest, i.e., to collect alleged outstanding charges on the shipments, rather than on behalf of Complainants.

Limco claims that "ITLC could have had enforceable lien rights against the cargo." Limco's Exceptions at 15. While there may be scenarios in which ITLC could have had authority to direct Limco to change the names on the bills of lading, Limco had notice that ITLC's motivations were contrary to those of its shipper, the Complainants. The evidence of months of frequent conversations between Limco and ITLC about how to get paid and how to change the name of the shipper and consignee, as described above, supports knowledge of Limco that ITLC lacked the legal recourse of liquidation. As such, when ITLC ultimately directed Limco to alter the bills of lading, it was more reasonable for Limco to assume that ITLC was acting out of self-interest rather than acting upon an enforceable lien.

Limco asserts that section 10(d)(1) should not apply to single or isolated conduct. As discussed above with respect to ITLC, the Commission has determined that a failure in connection with a single shipment or transaction can constitute a violation of section 10(d)(1), *Kobel*, 32 S.R.R. at 1731, and in any event, Complainants' claim involves three separate transactions.

Limco alleges that "[t]he interpretation of Section 10(d)(1) to impose strict liability for any failure to follow a reasonable practice essentially makes carriers guarantors of mistake-free service." Limco's Exceptions at 17. Discussing the predecessor to section 10(d)(1) (section 17 of the Shipping Act, 1916), the Supreme Court stated that "the question of reasonableness under [section] 17 does not depend upon unlawful or discriminatory intent." *Volkswagenwerk Aktiengesellschaft v. Federal Maritime*

Commission, 390 U.S. 261, 281 (1968). The Supreme Court agreed with the Commission's determination that "(Sections 16 and 17) proscribe and make unlawful certain conduct, without regard to intent. The offense is committed by the mere doing of the act, and the question of intent is not involved." *Id.* (quoting *Hellenic Lines Ltd. - Violation of Sections 16 (First) and 17*, 7 F.M.C. 673, 675-676 (1964)). As the Commission stated in its July 2013 Order, "[n]o language of section 10(d)(1) indicates that only an intentional or willful failure would constitute a violation." *Kobel*, 32 S.R.R. at 1731. Therefore, regardless of whether Limco's conduct was intentional or negligent, if Limco failed to establish, observe, and enforce just and reasonable regulations and practices with respect to Complainants' containers, Limco violated section 10(d)(1).

Limco claims that the ALJ's Remand Decision "reaches the anomalous conclusion that Limco violated Section 10(d)(1) because it established and observed a just and reasonable practice." Limco's Exceptions at 8. This is not an accurate representation of the ALJ's determination. The ALJ stated that:

> Limco established the just and reasonable practice of changing bills of lading at the request of the freight forwarder. However, Limco was not entitled to rely solely on the freight forwarder's request *under these facts*, because Limco knew or had reason to know that the freight forwarder was acting contrary to the principal's interests.

Kobel, 33 S.R.R. at 604 (emphasis added). Thus, the ALJ determined that while Limco had a just and reasonable practice of changing bills of lading at the request of a freight forwarder, Limco should not have followed the general practice "under these facts" because Limco knew or had reason to know that ITLC was acting contrary to Complainants' interest. Therefore, the ALJ concluded that "[b]y changing the bills of lading for [Complainants'] three containers when it knew or had reason to know that the change was requested due to an improper liquidation, Limco violated section 10(d)(1)." *Id.*

If it was Limco's practice to blindly follow a freight forwarder's request to change bills of lading when Limco knew or had reason to know that the freight forwarder was acting adversely to its shipper's interest, Limco's practice was not just and reasonable. If, on the other hand, it was Limco's practice to contact its shipper when Limco knew or had reason to know that the freight forwarder was acting adversely to its shipper's interest, Limco failed to observe and enforce this practice with respect to Complainants' shipments. Either way, Limco failed to establish, observe, and enforce just and reasonable regulations and practices with respect to Complainants' containers as required under section 10(d)(1) of the Shipping Act, and thus, it violated section 10(d)(1).

Contrary to Limco's assertion that "[t]here is absolutely no evidence in the record to support a conclusion that Limco knew ITLC was acting improperly or adverse to the interests of Complainants when it requested that the bill of lading be amended" (Limco's Exceptions at 12), the evidence shows that Limco knew or should have known that ITLC, a freight forwarder, was planning to sell the containers in disregard of Complainants' interests. As noted by the ALJ, and stated previously herein, Limco also knew or should have known that ITLC was a freight forwarder with a fiduciary duty to Complainants and without authority to liquidate the containers.

Therefore, under the circumstances presented, the ALJ reasonably concluded that Limco violated section 10(d)(1) by changing the bills of lading for the three containers, when it knew or had reason to know that the change was requested in connection with an unauthorized liquidation.

3. Damages

Limco alleges that "the [Remand Decision] failed to deduct from the value of the goods the demurrage and other charges incurred by the cargo as a result of the Complainants' failure to promptly pick up the containers upon arrival at the Port of Gdynia." Limco's Exceptions at 18. Limco further alleges that "[b]y failing

to deduct demurrage charges from the award of damages, the [Remand Decision] requires Respondents to indirectly pay for the demurrage charges incurred solely as a result of Complainants[']failure to promptly pick up their containers." *Id.* at 19.

On the contrary, the evidence shows that the purchaser of the three containers and cargoes therein, Mr. Oleg Remishevskiy, paid all outstanding charges to Baltic Sea Logistics. Findings 117 and 123. Therefore, contrary to Limco's allegation, storage/demurrage charges are not included in the award of damages. In fact, ITLC refunded part of Complainants' payments of freight charges (Finding 129), because ITLC had already recovered all outstanding freight charges and resolved the storage/demurrage charge issue through the liquidation. We agree with the ALJ that "[t]he evidence provided largely supports Complainants' allegations of damages." *Kobel*, 33 S.R.R. at 606.

IV. DISSENT

While the dissent answers several questions that are not present in the case, it does not seriously attempt to answer the one that is: what does it mean to "fail to . . . observe" otherwise just and reasonable practices? The closest it comes is in a reference to "triplets," and that Congress intended the words "establish," "observe," and "enforce" to have the same meaning. *See* post at 55. Such redundancy is possible. Congress does occasionally use two words that have the same meaning. But we are also instructed by the Court to "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

We cannot let pass the irony of the dissent's invocation of the Whole Text Canon when the dissent fails to give meaning to several important words in § 41102(c). This is an instruction that the dissent follows when convenient, such as in the discussion of the word "practice," where one learns about all sorts of statutes other

than the Shipping Act. The dissent's quixotic fixation on the word "practice" does not resolve the meaning of other pesky words in the statute (such as "observe" and "enforce"). Some readers might be left confused by the dissent's discussion of what it means to establish a reasonable practice, and then run afoul of enforcing the practice by a repeated refusal to follow the practice (which, to us, sounds a lot like establishing an unreasonable practice, or failing to *observe* a reasonable practice). We do not think it likely that Congress thought that, in order to show a "fail[ure] to establish, observe, and enforce" a reasonable practice, a claimant must show a *practice* of failing to observe a reasonable practice. To require claimants to make such a showing would render the prohibitions of section 10(d)(1) virtually meaningless.

To its credit, the dissent acknowledges that the Commission had two divergent lines of precedent related to § 41102(c). The dissent's less-than-charitable description of one line of cases pins its entire development on a single Commission Administrative Law Judge, rather than the Commission that adopted those decisions as its opinion.

There is a technical term for when a word or phrase is susceptible to multiple meanings: ambiguity. One court recently agreed with the Commission's interpretation on this precise issue. *See Chief Cargo Servs. v. Federal Maritime Commission*, 586 F. App'x 730, 732 (2d Cir. 2014) ("At the first *Chevron* step, we identify ambiguity in the phrase 'just and reasonable regulations and practices,' which is not defined in the [Shipping] Act."). Other courts have similarly recognized the broad language that the Commission must interpret. *See Plaquemines Port, Harbor & Terminal Dist. v. Federal Maritime Commission*, 838 F.2d 536, 549 (D.C. Cir. 1988) (stating that through § 41102(c)'s "broad language . . . Congress has explicitly delegated responsibility for administering the statutory program to the FMC").

Faced with ambiguity in statutory language, how should the Commission address divergent lines of Commission case law

dealing with § 41102(c)? One course is to do exactly what the Commission did here – review the language of the statute, the relevant surrounding text, its structure, and the caselaw interpreting it, and determine which interpretation of ambiguous language is most consistent with the overall purposes of the Shipping Act. In doing so, the Commission has adequately explained its rationale for choosing one line of precedent. The Commission has done so in an open, exhaustive manner, and has meaningfully explained the reason why it has interpreted § 41102(c) in a way that harmonizes all words in the statute.

V. CONCLUSION

THEREFORE, IT IS ORDERED, That the ALJ's Remand Initial Decision is affirmed.

IT IS FURTHER ORDERED, That by June 11, 2015, Respondents International TLC, Inc. and Limco Logistics, Inc. shall jointly and severally pay Complainants reparations in the amount of $126,072 and interest in the amount of $2,963.29, totaling $129,035.29.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary

Commissioner Doyle, concurring, in which *Commissioner* Lidinsky joins:

While I agree with the majority's decision to uphold the finding that both ITLC and Limco violated section 10(d)(1) of the Shipping Act, I am writing separately to (1) stress that the majority's position is backed by longstanding Commission precedent, and (2) urge the Commission to reconsider its method for determining liability between parties.

I. Past Precedence

On page 5 of our majority decision in this case we note the following:

> The Commission determined in its July 2013 Order that a failure in connection with a single transaction can be a violation of section 10(d)(1) of the Shipping Act. The Commission stated that "[e]ven the failure in a single transaction can be a failure to observe and enforce a just and reasonable regulation and practice, and therefore, a violation of 10(d)(1)." Kobel, 32 S.R.R. at 1730.

To this end, it is important to point out that the July 2013 Order was not cut out of whole cloth. Thus, it is worth repeating a portion of the Commission's July 12, 2013 Order related to longstanding precedence. In the July 2013 Order, under the heading of *Commission Precedent*, we listed the following line of cases and provided textual context:

> The Commission has found that a failure to observe and enforce just and reasonable practices is a violation of section 10(d)(1), regardless of whether it involves a single shipment or multiple shipments. See, e.g., *Paul Houben v. World Moving Services, Inc*., 31 S.R.R. 1400 (FMC 2010) (NVOCC's failure to pay the destination agent monies already received by the NVOCC for such

> services was held a violation of section 10(d)(1) by "failing to engage in just and reasonable practices."); *William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc*., 29 S.R.R. 6 (FMC 2001) (NVOCC held to have violated section 10(d)(1) with respect to a single shipment when it refused to release the cargo at the destination port unless additional money was paid, and instructed its agent to place the shipment on hold.); *Hugh Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871 (ALJ 1993) (NVOCC's failure to carry out its obligation to transport the cargo or to return the money despite repeated demands was held a violation of section 10(d)(1) as it showed "a failure to establish, observe and enforce just and reasonable regulations and practices."); T*ractors and Farm Equipment Limited v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788 (ALJ 1992) (freight forwarder held to have violated section 10(d)(1) by failing to establish, observe and enforce just and reasonable practices with respect to two shipments when the freight forwarder prepared incorrect booking notes and dock receipts, and issued an altered bill of lading containing false information.); and *William R. Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ 1991) (NVOCC failed to establish, observe, and enforce just and reasonable regulations and practices in violation of section 10(d)(1) when the NVOCC unreasonably aborted a shipment, notwithstanding the fact that it had issued an on-board bill of lading, thereby allowing a misleading shipping document to go forward in the shipping process.) Kobel, 32 S.R.R. at 1731, 1732.

In conclusion, the Commission's interpretation is well-grounded and consistent with the line of cases whose holdings give full meaning to section 10(d)(1).

II. Apportioning Respondents' Liability

There is no doubt that ITLC breached its fiduciary duty to its shipper client when it arranged for the sale and liquidation of cargo. In addition, Limco's failure to confirm ITLC's request to change the bill of lading with the shipper given the set of circumstances in this case, allowed ITLC's sale to proceed. Both ITLC and Limco are responsible for a portion of Claimant's injuries, but the Commission's liability standard holds them jointly and severally liable.

The apparent inability to assign a specific portion of liability in the present case is troubling. Here, a freight forwarder, who breached its fiduciary duty to its shipper by planning and executing an unauthorized sale of cargo, may in reality face zero financial liability simply because the NVOCC has a deeper pocket. By holding both parties jointly and severally liable, violators of 10(d)(1) are subject to a system of disproportionate deterrence. In order for 10(d)(1) to be effective in ensuring proper conduct, the deterrent cannot exist only in theory, but instead must be a financial reality for the parties. A party's financial liability for damages that result from a 10(d)(1) violation should not depend upon the financial wealth of their co-respondents.

Respondents often bear the responsibility of losses that they in fact did not cause. In cases where co-respondents are held jointly and severally liable, a claimant will routinely seek to recover all damages from one respondent as a matter of convenience. In other instances, a shipper's action or inaction is a contributing factor to the cause of the damages; the shipper in the present case failed to pick up its cargo for several months while storage fees accrued. Whether it is because of their co-respondent or inaction on the part of the shipper, a respondent may be forced to incur all of the damages even though only a portion is attributable to its 10(d)(1) violation. Apportioning liability based on fault, will allow the Commission to more clearly define a shipper's duty to mitigate and will be more effective in carrying out the purpose of 10(d)(1) by providing the proper amount of disincentives for all parties.

Commissioner Khouri, dissenting, in which *Commissioner* Dye joins:

I respectfully dissent from my brother Commissioners' decision that Hapag-Lloyd A.G. (Hapag) violated section 10(d)(1), 46 U.S.C. Section 41102(c), of the Shipping Act of 1984, notwithstanding the majority's ultimate finding of dismissal from the proceeding because Hapag's Shipping Act violation was not found as the causative factor that resulted in the alleged damages suffered by claimants in Poland. I further respectfully dissent from the majority's decision that Limco Logistics (Limco) and International TLC (ITLC) both violated section 10(d)(1) of the Act and are liable for reparations payable to Claimants.

I adopt and fully incorporate herein the views, arguments and reasoning set forth in my dissents in *Yakov Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R 1720 (FMC 2013) ("*Kobel* Remand Order"); *Bimsha International v. Chief Cargo Services, Inc.*, 32 S.R.R. 1861 (FMC 2013)("*Bimsha*"); *Smart Garments v. Worldlink Logix Services, Inc*., 33 S.R.R. 65 (FMC 2013); *Temple v. Anderson*, Docket No. 1919(I), __ S.R.R. __ (FMC October 22, 2013) (Order vacating and remanding decision of Settlement Officer); *Petra Pet, Inc., v. Panda Logistics Ltd.*, 33 S.R.R. 4 (FMC 2013); *Best Way USA, Inc. v. Marine Transport Logistics*, 33 S.R.R. 13 (FMC 2013); *Century Metal Recycling Pvt. Ltd., v. Dacon Logistics LLC*, 33 S.R.R. 17 (FMC 2013); *Sulaiman Bah v. Amadu K. Jah*, Docket No. 1915(I), __ S.R.R. __ (FMC 2013); *Shekinah International Mission, Inc. v. Sefco Export Management Company, Inc., World Cargo Transport, Inc., Eagle Systems, Inc., and Zim Integrated Shipping Ltd*., Docket No. 1914(I), __ S.R.R. __ (FMC 2013); *Adebisi Adenariwo v. BPD International, Zim Integrated Shipping, Ltd. And its Agent (Lansal) et al.*, Docket No. 1921(I), 33 S.R.R. 223 (FMC 2014); *Michael Anad Styer v. Online Shipping Advisers*, Docket No. 1863(I), 33 S.R.R. 536 (FMC 2014); *Geo Machinery FZE v. Watercraft Mix, Inc.*, Docket No. 1935(I), 33 S.R.R. 329 (FMC 2014); and *Medisend International, Inc. v. TJD International, Inc.*, Docket No. 1936(I), 33 S.R.R. 492 (FMC 2014), *Bai Koroma et al.*

v. Global Freightways (USA Ltd. Et al., __S.R.R. __ (FMC 2013).

This dissenting opinion is organized into nine sections. It begins with a summary of findings, a fact summary, followed by a summation of the majority's position, and the minority position. Section V sets out the framework for analysis. Next is a longer section that analyzes the purpose, text, legislative and judicial history, and the structure of the Shipping Act. Last, I discuss more recent Commission arguments, then two positions that reach beyond the initial analytical framework, and a final conclusion.

I. FINDING SUMMARY

As set forth in the majority decision's opening section, this proceeding has been through substantial and lengthy review before the Commission. The complaint was filed in July, 2010. After discovery, a full evidentiary hearing with four days of testimony in Portland, Oregon, and post hearing briefing, the ALJ issued an Initial Decision in February, 2012 dismissing the complaint, *Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 512 (ALJ 2012). In July, 2013, the Commission entered an Order Vacating Initial Decision in Part and Remanding for Further Proceedings, *Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1705 (FMC 2013). I filed a dissenting opinion in that *Kobel* Remand Order. In July, 2014, the ALJ entered her Remand Initial Decision. *Kobel v. Hapag-Lloyd A.G.*, 33 S.R.R. 594 (ALJ 2014). Full Commission review was requested and we now have a final Commission decision to consider.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the U.S. Supreme Court directed lower courts and federal agencies to "give effect to the unambiguously expressed intent of Congress" as concerns the statute which the agency administers. *Id.* at 843. In *Natural Resources Defense Council v. Browner*, 57 F.3d 1122 (D.C. Cir. 1995), the U.S. Court of Appeals for the District of Columbia Circuit directed federal agencies to "exhaust the traditional tools of statutory construction" and interpretation as each agency searches

for, examines, analyzes, and discusses – for the benefit of the regulated community and the public at large – the agency's findings as regards the intent of Congress and the statute which the agency administers. *Id.* at 1125. In *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), the D.C. Circuit held that, in determining whether a statute is ambiguous and in ultimately determining whether the agencies interpretation is permissible or instead is foreclosed by statute, we must employ all the tools of statutory interpretation…. *Id.* at 1016 (emphasis added).

The majority's positions on section 10(d)(1) of the 84 Act violates and stands in clear contradiction to numerous canons and traditional tools of statutory construction. Congress used the word "practice" and the full phrase, "establish, observe, and enforce just and reasonable regulations and practices", as now found in section 10(d)(1) of the 84 Act, in a particular way and context that stands in clear and unambiguous opposition to the majority's construction and current application of the section. The Commission has failed (i) to properly engage in a full *Chevron* Step One examination and (ii) to give effect to the expressed intent of Congress. Ultimately, The Commission's acts, judgments and orders of award of reparations and attorney fees in the case *sub judice* are *ultra vires.*[2] These views are supported by the discussion, analysis and reasoning set forth below.

II. FACT SUMMARY

While the majority opinion sets forth a full description of the facts, I offer this summary. Claimants wanted to enter into the export business. They were not well versed in international export-import business or related legal matters. Their business plan was to purchase five standard shipping containers, purchase plywood, motor oil and similar merchandise at "big box" stores in the U.S.

[2] *See City of Arlington v. FCC, 133 S. Ct. 1863, 1869 (2013).* "Both their (agencies charged with administering congressional statutes) power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*."

paying full retail price, load such goods into the containers, ship the containers to Eastern Europe, and finally sell the goods in Eastern Europe at a net profit after paying all related costs and expenses.

ITLC conducts business offering freight forwarder services; however, it did not have a license from the Commission to engage in such activity. Limco was licensed with the Commission to conduct non-vessel operating common carrier (NVOCC) services. Hapag was a licensed vessel operating common carrier (VOCC) operating container ships in international commerce.

From April to July 2008, Claimants engaged ITLC to handle and arrange for the shipment of their five containers, loaded with cargo as outlined above, from Portland, OR, to Gdynia, Poland. ITLC, in turn, contracted with Limco to make the ocean transportation arrangements.

Limco then proceeded to (i) issue house bills of lading for the five containers listing Claimant Viktor Verkovich [sic] as the exporter, shipper and consignee, and (ii) contracted with Hapag, the actual vessel operator, to perform the transportation. Hapag, in turn, issued five master bills of lading that listed Limco as the shipper, and Baltic Sea Logistics (BSL), a European company, as the designated receiving consignee.

Container # 1 and #2 were picked up in the port of Portland, OR, delivered to Poland, and picked up at the port by Claimants without incident.

Container #3 was inadvertently damaged in the loading process at the port of Portland, OR. Hapag placed container #3 in a hold status, and contacted the Claimants. Hapag offered to transfer the cargo to a Hapag container – at its expense – and thus complete the transportation. Claimants refused Hapag's offer and deliberations continued. By unexplained clerical error, Hapag then loaded container #3 on a subsequent ship bound for Europe.

Container #3 was off-loaded in Hamburg, Germany. No cargo damage was claimed then, or at any other time due to the sea voyage and the damaged nature of the container. However, due to the visible outer container damage, there were delays in arranging for a truck to complete the land leg of the journey to Poland. Many discussion went back and forth with Hapag offering to assist in several ways. Container #3 remained at the Hamburg dock for several months.

Ultimately, Hapag (i) transferred the cargo from Container #3 into a new Hapag container, (ii) delivered the substitute container to Poland by sea, (iii) delivered the Claimants' empty container #3 to Poland by truck, and (iv) re-transferred the cargo from the Hapag container into container #3 – all at Hapag's expense. Complainants then failed to take delivery of container #3 at the Polish seaport for months resulting in the accumulation of port storage fees.

In September, containers #4 and #5 were transported by Hapag from Portland, OR to Poland without incident. From October through December, BSL (local delivery agent/consignee) and Limco notified ITLC about the accruing port storage charges on these last two containers. Claimants ignored repeated communications and continued in their failure to take delivery of containers #3, #4, and #5.

In January, 2009, ITLC notified Claimants of the unpaid charges and further notified them that the cargo and the containers were subject to liquidation sale procedures. Claimants ignored the ITLC notice arguing that they disputed the amount of the charges. ITLC compromised the invoice, but then Claimants paid only a small portion of the reduced compromise invoice.

ITLC became concerned that it might be held liable for the accruing port charges. While it was not determined if such liability was a real threat, and the availability of "lien holder" status was likewise in question, ITLC began the liquidation process for the three containers that remained at the Gdynia, Poland, terminal yard.

Cursory notice of the pending sale was posted in ITLC's office. The sale was completed to a Mr. Remishevskiy in March.

To complete the documentation of the sale, ITLC instructed Limco in March to issue new bills of lading for the three containers showing Mr. Remishevskiy as the exporter/shipper and consignee. Claimants' names were not included in the new bills of lading. Claimants did not authorize Limco to issue such revised bills of lading. Mr. Remishevskiy paid the storage charges to BSL and paid $9,900 to ITLC. Mr. Remishevskiy picked up the three containers and departed the port.

Later in March, Claimants finally paid ITLC's invoice and went to the port to retrieve the three containers only to discover the containers had been sold. ITLC subsequently refunded $10,200 to the Claimants. As a final note, containers #1 and #2 remained in Claimants' possession at the time of closing of evidence in the proceeding; allegedly because the Claimants could not sell the goods in Poland allegedly due to (i) issues that the U.S. labeling did not meet European requirements and further, (ii) there was not a market for the goods at the prices required to cover the purchase and transportation costs.

Based upon the above facts, the majority finds in this docketed proceeding that Hapag's act and/or omission at the origin terminal violated the provisions section 10(d)(1) of the Act as regards container #3. Next, the majority finds that Limco and ITLC's acts and/or omissions regarding containers # 3, #4, and #5 violated the provisions of section 10(d)(1) of the 84 Act and that these two entities must pay as reparations to Claimants an amount equal to the total retail purchase price of the cargo as paid in Oregon, USA. Respondents Limco and ITLC are further liable for Claimants' attorney fees.

III. MAJORITY POSITION

In order to reveal the many errors of the majority's position, one must take an in-depth journey into the history of the early railroad industry and the steam ship cartels and conferences that, together, dominated U.S. domestic land transportation and foreign borne ocean transportation at the turn of the 20th century. Then one must consider the development of the Interstate Commerce Act of 1887 (ICA)[3], the Shipping Act of 1916 (the "1916 Act")[4], and the Shipping Act of 1984 (the "1984 Act"). Finally, one must understand the history of reviewing court decisions and the transportation deregulation movement in the late 1970s and 1980s. It is a journey that the majority has repeatedly eschewed. So, to once more set sail.

In the sequence of Decisions and Orders in this proceeding, the majority finds that the term "practices," as Congress used such term in section 10(d)(1) of the 1984 Act, now means any and all commercial and industry requirements and proscriptions as found anywhere in the legal universe including the common law of agency, contracts, torts, and admiralty among others; all state laws, such as, in this case, the reliance on the uniform commercial code of Oregon and the fiduciary duties chronicled therein, and all federal statutes together with accompanying regulations, such as the Carriage of Goods by Sea Act (COGSA), Title 46 United States Code §§ 1300-1315.

Proceeding from there, the majority finds that a maritime entity that is properly subject to the jurisdiction, oversight and regulation of the Commission - be it a common carrier, an ocean transportation intermediary, or a marine terminal operator, has a duty to follow and abide by all afore described commercial and industry "practices".[5] Any failure by the regulated entity in any

[3] The Interstate Commerce Act of 1887, Ch. 104, 24 Stat. 379 (1887).
[4] The Shipping Act of 1916, Sept. 7, 1916, Ch. 451, 39 Stat. 728.
[5] The prohibited acts proscribed in section 10(d)(1) apply to "common carriers, ocean transportation intermediaries, or marine terminal operators." 46 U.S.C. §

single incident or in any isolated series of incidents to so comply with the "duty" to "establish, observe, and enforce" such "industry" practices is a violation of section 10(d)(1) of the Act.[6] It is axiomatic that compliance with such "industry practice(s)" is "just and reasonable". Along that path, the majority also finds that Congress *really meant* to use the disjunctive "establish, observe, *or* enforce" rather than the actual conjunctive language as enacted in the statute.

Thus warmed by examination and rendered down to its essence, the majority's position is that all federal and state laws and regulations together with all common law jurisprudence, including the common law of agency, admiralty, contracts, torts and similar sources of common law duties that in any way relate to or have some connection with the business relationships between common carriers, ocean transportation intermediaries, or marine terminal operators on one hand and the shipping public on the other and regarding the receiving, handling, storing, or delivering of property are, individually and collectively, just and reasonable regulations and practices. Any failure to observe any such just and reasonable regulation or practice is a violation of section 10(d)(1).

To put the new formulation in stark legislative language, through a series of small claim case decisions, the majority has effectively amended section 10(d)(1) to now provide:

> No common carrier, ocean transportation intermediary, or marine terminal operator may fail to observe *any* legal or commercial duty imposed by federal or state law, or by *any* common law provision, including, but not limited to the law of agency, admiralty, contract, or tort or other similar strictures relating to or connected with receiving, handling, storing, or delivering property.

41102(c).

[6] Section 10(d)(1), 46 U.S.C. § 41102(c), provides that "[n]o common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

The majority has confused and conflated "industry practice" with a practice that is established by a regulated entity concerning the receipt, handling, storage and delivery of property pursuant to the Shipping Act and the utilization of such practice by the regulated entity on a normal, customary, and continuous basis. One might concede that a single violation of a legal duty found in the law of agency is an unjust and unreasonable act that may be presented to a court of proper jurisdiction. The question remains, however, does the regulated entity commit such act on a *normal*, *customary*, and *continuous* basis and thereby implicate the 1984 Shipping Act. The practical effect of the majority position is the Federal Maritime Commission becomes a court of common pleas for all such state and federal claims and common law causes of action with new and sweeping jurisdiction over judicial matters that Congress never intended, much less authorized by enactment of the 1984 Act

IV. MINORITY POSITION

As will be fully discussed below, Congress first used statutory language addressing the legal duty of transportation common carriers to "establish, observe, and enforce just and reasonable . . . regulations and practices . . . affecting [cargo] classification, rates, or tariffs . . . [and] the manner and method of presenting, marking, packing, and delivering property for transportation. . ." in the 1910 Mann-Elkins Act amendment (Mann-Elkins) to the Interstate Commerce Act (ICA).[7] From that time forward, the Interstate Commerce Commission (ICC), the United States Shipping Board (USSB) (the agency created by Congress in the 1916 Act), its successor agencies, and the currently constituted Federal Maritime Commission[8], together with state and federal

[7] Mann-Elkins Act, 61st Congress, 2nd session, Ch. 309, 36 Stat. 539, enacted June 18, 1910.

[8] The United States Shipping Board (USSB) was succeeded in 1933 by the United States Shipping Board Bureau of the Department of Commerce (USSBB), Executive Order No.6166 (1933). The USSBB was succeeded in 1936 by the United States Maritime Commission (USMC), 49 Stat. 1985. In 1950, the USMC was succeeded by the Federal Maritime Board (FMB), 64 Stat.1273. The FMC

courts have consistently ruled that "practice" means; 1) the acts/omissions of the regulated common carrier that were positively established by the regulated common carrier and imposed on the passenger/cargo interest, and 2) such act/omission was the normal,[9] customary, often repeated,[10] systematic,[11] uniform,[12] habitual,[13] and continuous manner[14] (hereinafter "Normal, Customary &

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was established as an independent regulatory agency by Reorganization Plan No. 7, effective August 12, 1961. The U.S. Supreme Court treated the FMC and all predecessor agencies as the "Commission" for purposes of judicial review. *See Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 269 (1968).

[9] *See European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59, 63 (FMC 1979). (Unless its normal *practice* was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law [emphasis in original]."

[10] *See Intercoastal Investigation, 1935*, 1 USSBB 400, 432. ("Owing to its wide and variable connotations a practice which unless restricted ordinarily means an *often* and *customary action*, is deemed to acts or things belonging to the same class as those meant by the words of the law that are associated with it [cites omitted][emphasis added]."

[11] *See Whitam v. Chicago, R.I. & P. Ry. Co.*, 66 F.Supp. 1014 (ND TX 1946)("The word 'a practice' as used in the decision, or used anywhere properly, implies *systematic* doing of the acts complained of, and usually as applied to carriers and shippers generally [emphasis added]."

[12] See *Stockton Elevators*, 3 S.R.R.605, 618 (FMC 1964). ("It cannot be found that the Elevator engaged in a 'practice' within the meaning of Section 17. The essence of a practice is *uniformity*. It is something habitually performed and it implies continuity … the usual course of conduct. It is not an occasional transaction such as here shown. *Intercoastal Investigation, 1935*, 1 USSBB 400, 432; *B&O By. Co. v. United States* 277 U.S. 291, 300, *Francesconi & Co. v. B&O Ry. Co.*, 274 F 687, 690; *Whitham v. Chicago R.I. & P. Ry. Co.*, 66 F Supp. 1014; *Wells Lamont Corp. v. Bowles*, 149 F. 2d 364.[emphasis added]" *See also, McClure v. Blackshere*, F.Supp. 678, 682 (D. Md. 1964)("'Practice' ordinarily implied uniformity and continuity, and does not denote a few isolated acts, and *uniformity* and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated [cites omitted][emphasis added]."

[13] *See Stockton Elevators*, 3 S.R.R.605, 618 (FMC 1964). ("It cannot be found that the Elevator engaged in a 'practice' within the meaning of Section 17…. It is something *habitually* performed and it implies continuity … the usual course of conduct. [cites omitted][emphasis added]."

[14] *See Stockton Elevators*, 3 S.R.R.605, 618 (FMC 1964). ("It cannot be found that the Elevator engaged in a 'practice' within the meaning of Section 17…. It is something habitually performed and it *implies continuity* …. [cites

Continuous") in which the regulated common carrier was conducting business

Then, the third element; such "practice" must be proven to be unjust or unreasonable within the context of the Shipping Act. A seminal Commission case gave the further context that a measure of whether the "practice" was unjust or unreasonable was whether such practice "deterred the commerce of the United States."[15] This plain, ordinary meaning prevailed until 1991 when an Administrative Law Judge (ALJ) serving at the Commission took a course change in a minor *pro se* proceeding.[16] Thus began the slow, quiet, red tide that mutated the definition of "practice" into the majority's current position.

The minority position concerning proper construction of section 10(d)(1) follows:

> The word "practice", within the phrase "regulations and practices" – when read together, in context, and after consideration of all rules and canons of statutory construction and interpretation – means the business rules, protocols, and methods utilized by the regulated entity as it conducts transportation services in international waterborne commerce. The compass setting of the view begins at the regulated entity and flows toward the cargo shipper. The practice must be the Normal, Customary & Continuous manner in which the regulated entity does business with the

omitted][emphasis added]" *See also*, *McClure v. Blackshere,* F.Supp. 678, 682 (D. Md. 1964)("'Practice' ordinarily implied uniformity and continuity, and does not denote a few isolated acts, and *uniformity* and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated [cites omitted][emphasis added]."

[15] *See Practices of Stockton Elevators*, 8 F.M.C. 187, 201(FMC 1964)("However, even if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred (emphasis added)."

[16] *See William R. Adair v. Penn-Nordic Lines, Inc.,* 26. S.R.R. 11 (ALJ 1991).

cargo shipper. For Shipping Act purposes, such practice must also be found to be "unjust or unreasonable".

To overlay the facts of this case into the minority perspective, if Hapag's acts or omissions in first, damaging the container at the loading port, or, later loading the damaged container onto one of its ships, and cargo damage during the sea voyage resulted, then a violation of COGSA may have occurred.[17] However, no act or omission has occurred that properly falls within the bounds of the Commission's statutory authority. Congress clearly set forth the processes, defenses, and the standards and limitations for assessment of damages in COGSA.[18] As a separate matter, if the record evidence showed that Hapag was similarly mishandling customer's containers on a "Normal, Customary, and Continuous" basis, then, arguably, the provisions of section 10(d)(1) could come into play.

If ITLC and Limco failed to follow the requirements of the Oregon UCC concerning lawful processes and notice procedures required before a customer's cargo could be sold at auction to recover lawful storage charges incurred in Poland, then the State of Oregon and any federal court with proper personal jurisdiction and venue could decide that case.[19] If ITLC and Limco were mishandling the process of customer notification and auction sales of their customer's containers on a "Normal, Customary, and Continuous" basis, then section 10(d)(1) of the Shipping Act may be implicated.

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[17] That this would be a violation of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315, is certainly something he majority would concede.

[18] *See* Carriage of Goods by Sea Act (COGSA), Title 46 United States Code §§ 1300-1315. COGSA provides for a number of defenses and limitations, including inherent vice of the goods, limitation of liability to $500 per customary freight unit unless higher cargo value declared, a one year statute of limitation, after which the common carrier is free from liability, and use of Himalaya Clause where benefit of COGSA's limitation of liability may be extended to parties beyond the "tackle to tackle" period.

[19] The issue of extraterritorial application of a state law might need to be addressed.

The federal COGSA statute and the Oregon Uniform Commercial Code (UCC) comfortably occupy one legal sphere. The Shipping Act occupies a parallel sphere that looks to protect U.S. importers and exporters at a different and broader level. These two spheres do not; however, jointly occupy the same space.[20]

V. FRAMEWORK FOR ANALYSIS

The U.S. Supreme Court changed the foundation of administrative law, federal agency responsibility, and court review protocols in 1984 in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The first arm of that seminal decision states:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress.

Id. at 842-843 (emphasis added).

This first principle is further illuminated by footnote 9 of the *Chevron* decision, as follows:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [citations omitted] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Id. at n.9.

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[20] See discussion of *A. N. Deringer, Inc. v. Marlin Marine Services, Inc*., 25 S.R.R. 1273, 1277, *infra*.

A commonly overlooked but key concept in *Chevron* analysis is that the federal agency's positions and arguments concerning its construction of the statute within the Step One phase are not due one iota of deference by the reviewing court. *Chevron* Step One is in the sole domain and responsibility of the Article III court. Federal Courts have continued to add explanation concerning the application of *Chevron* Step One. In a 1997 case, *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), the U.S. Court of Appeals for the District of Columbia Circuit offered the following additional direction:

> Under the first step of *Chevron*, the reviewing court "must first *exhaust* the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." The traditional tools include examination of the statute's text, legislative history, and structure; [cite omitted] as well as its purpose. This inquiry using the traditional tools of construction may be characterized as a search for the plain meaning of the statute. If this search yields a clear result, then Congress has expressed its intention as to the question, and deference is not appropriate. . . [T]extual analysis is a language game played on a field known as "context". The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use. In short, "the meaning of statutory language, plain or not, depends on context." . . . Context serves an especially important role in textual analysis of a statute when Congress has not expressed itself as univocally as might be wished.

Id. at 1047 (citations omitted)(emphasis added).

In *Pharmaceutical Research and Manufacturers of America v. Thompson*, 252 F.3d 219 (D.C. Cir. 2001), the District of Columbia Circuit Court in 2001 considered a Medicare statute and an expansive definition of the word "payment" being proffered by

the U.S. Department of Health and Human Resources. Appellant Pharmaceutical Research argued that use of traditional cannons of statutory construction compelled a more circumscribed definition. Citing *Bell Atlantic Telephone*, the court held:

> [W]e need not decide whether the Department's approval of the PDP [prescription drug price] would be entitled to *Chevron* deference, for using traditional tools of statutory interpretation – text, structure, purpose, and legislative history, – we conclude that Congress has "directly spoken to the precise question at issue"; that is, whether "payments" includes expenditures that are fully reimbursed by manufacturer rebates. . . . Although . . . the word "payment" is broad enough to include reimbursed expenditures, consideration of the word's context – the statute's purpose and legislative history – reveals a far narrower meaning.

Id. at 224 (citation omitted).

In *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), a case that is a close, if not exact, analogue to the proceeding *sub judice*, the District of Columbia Circuit last year considered a statute enacted in 1884 that authorized the Secretary of Treasury to regulate individuals who "practice" before the Department as a "representative" of a claimant before the Department. The traditional definition of "representative" had been attorneys, accountants, and other tax professionals who appear in adversarial proceedings before the agency. In 2011, the Internal Revenue Service (IRS) decided it would newly denominate all tax-return preparers – hundreds of thousands of individuals – as "representatives" – and thus bring them into the IRS's regulatory oversight. The Court began its *Chevron* analysis as follows:

> In determining whether a statute is ambiguous and in ultimately determining whether the agency's interpretation is permissible or instead is foreclosed by the statute, we must employ all the tools of statutory interpretation, including

> "text, structure, purpose, and legislative history" (citing *Pharmaceutical Research*). "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its authority*" (citing *City of Arlington).*

Id. at 1016 (emphasis in original).

VI. PURPOSE, TEXT, LEGISLATIVE AND JUDICIAL HISTORY, AND STRUCTURE

With the foregoing analytical framework before us, let's work through the elements. Since analysis of the origins of the text of section 10(d)(1) of the Act, as first used by Congress in 1910 in the Mann-Elkins Act amendment to the ICA, and the tools and cannons of statutory interpretation and construction tend to overlap in the four listed categories, I will begin with statutory purpose.

A. Purpose

The ICA was enacted to bring federal regulatory order to the rapidly expanding railroad industry in the late 19th Century. The ICA established the first independent federal regulatory commission; the Interstate Commerce Commission (ICC). From there began the now common dance between a federal regulatory agency and a reviewing federal court. The railroads held substantial regional and national economic power. Consumers were at the mercy of these large and vital transportation companies. The railroads set forth their classifications of various cargos, freight rates, and relevant business regulations and practices in tariffs. Cargo customers and passengers conducted business with the railroads on the railroads' terms. The Sherman Act[21] and broader business regulation was still three years

[21] 26 Stat. 209, 15 U.S.C. §§ 1–7. Officially re-designated and to be recognized from then on as the "Sherman Act" by Congress in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, (Public Law 94-435, Title 3, Sec. 305(a), 90 Stat. 1383 at p. 1397).

away. As railroad regulation began to find its feet and gain credibility, Congress was asked to grant further authority to the ICC and Congress answered with Mann-Elkins[22] as discussed below.

In the ocean transportation arena at the turn of the 20th Century, numerous loose associations or liner ship owner "conferences" dominated virtually all sea trade lanes. A conference agreement would fix the agreed rate and all regulations, practices, terms and conditions for the receiving, handling, storing, and delivering of a specified cargo class over a specified trade route. For example, finished iron goods from England to the U.S. North Atlantic (Boston-to-New York) would have an ocean carrier conference agreement with subscribing members. Every ship owning member of the conference was bound by the conference agreement, tariff rate, rules, regulations, and practices. Every cargo owner of finished iron goods that wanted to move that cargo over that trade route had the benefit of a public and common freight rate and common application of the conference's regulations and practices for the transportation.

Congress was asked to bring federal regulation and oversight to these powerful shipping conferences that dominated the ocean borne imports and exports in U.S. commerce. Congress answered with the 1916 Act. In essence, the Shipping Act of 1916 was an antitrust statute and a regulatory statute. It provided that the ocean vessel conferences could agree on rates, regulations and practices; provided however, that (i) the conferences must file their conference agreements that set forth the tariff rules, freight rates, other charges (e.g. demurrage or terminal storage fees), cargo classifications, regulations, and practices with the Commission's predecessor agency, the United States Shipping Board, and then receive the Board's approval, and, further, (ii) the conference and its individual member steam ship companies must comply with all various provisions of the Shipping Act, such as establishing just and

[22] Mann-Elkins Act, 61st Congress, 2d Session, Ch. 309, 36 Stat. 539, enacted June 18, 1910.

reasonable rates, regulations and practices and abstaining from discriminatory activity as to individuals, cargos and ports. Compliance with all Shipping Act provisions granted the conferences and their ship owner members with immunity from application of the Sherman Act.

Before moving into the statute's text, legislative and case law history, it is worth noting that the purpose of the Shipping Act and the scope of the Commission's regulatory authority began to change and diminish in 1984 with the enactment of a revised Shipping Act[23] and then again in 1998 with passage of the Ocean Shipping Reform Act[24]. The 1984 Act allowed for more freedom by all regulated entities to offer market-based freight contracts, and importantly, removed significant areas of the Commission's regulatory authority. Of highest relevance in considering a section 10(d)(1) controversy, note that Congress took section 17 of the 1916 Act and repealed the Commission's authority to find freight rates as unreasonable and to order new, lower, more reasonable rates. Congress also repealed the Commission's authority to draft and order newly formed, more just or reasonable regulations or practices. As discussed below, what remains of the significantly circumscribed provision from section 17 of the 1916 Act was moved to section 10(d)(1) of the 1984 Act. All of this Congressional activity in ocean transportation deregulation took place in the context of broader transportation deregulation: the railroad deregulation statutes of 1976 and 1980, the trucking deregulation in 1980, and the deregulation of the domestic airlines and termination of the Interstate Commerce Commission and replacement by the Surface Transportation Board by the 104th Congress.[25]

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[23] Shipping Act of 1984, Pub. L. 98-237, 98 Stat. 67 (1984).
[24] Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998).
[25] *See* the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210; Staggers Act of 1980, Pub. L. 96-448; Motor Carrier Act of 1980, Pub. L. No. 96-296; Airline Deregulation Act, Pub.L. 95–504; and the Interstate Commerce Commission Termination Act of 1995, Pub.L. 104–88.

B. Statutory Text Language

The embarkation point for this analysis is the language of the 1910 Mann-Elkins amendments to the ICA referenced above.

> And it is hereby the duty of all common carriers subject to the provisions of this Act to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.[26]

The Mann-Elkins language clearly focused on the operating and business practices of railroads as commonly used and imposed upon passengers and cargo shippers. Also note that the term "practice" is juxtaposed to the term "regulation" in this inaugural Congressional enactment. With the ICC serving as the first federal independent regulatory agency, litigation and judicial decisions interpreting this statutory language followed, as discussed below.

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[26] Mann-Elkins Act, 61st Congress, 2nd session, ch. 309, 36 Stat. 539, enacted June 18, 1910 (emphasis added).

Six years after Mann-Elkins came the Shipping Act of 1916. The 1916 Act was Congress' response to the perceived commercial abuses that the market dominate shipping cartels were imposing on the U.S. import and export ocean commerce. Section 17 of the 1916 Act provided as follows:

> **Section 17. Discriminatory rates prohibited; correction by shipping board; supervision by board of regulations of carrier.**
>
> No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected, it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.
>
> Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Section 17 of the Shipping Act of 1916 (emphasis added).

The two separate provisions of Section 17 of the Shipping Act were commonly referred to as "section 17, first paragraph" and "section 17, second paragraph".[27] As with the ICA and Mann-

[27] For purposes of discussion, arguments and responses, I will further cleave the

Elkins, the term "practices" is again juxtaposed to the term "regulations". And again, the statute directs the common carrier to draft, to implement, and to enforce these just and reasonable "regulations and practices".

Section 18 of the 1916 Act addressed interstate commerce by water and gives more contextual reference to the terms "regulations and practices". It provides, in relevant part:

> **Section 18. Common carriers to establish schedule of rates and reasonable regulations for conduct of business; filing with shipping board; charge of more than maximum rates.**
>
> Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marketing, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.
>
> Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

Section 18, Shipping Act of 1916 (emphasis added).

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section as follows: section 17, first paragraph, part A and part B, and section 17, second paragraph, part A and part B. This dissection is to recognize each of the four sentences as separate sub-parts of section 17 of the 1916 Act.

The section heading states simply and clearly that common carriers are to establish reasonable regulations for the conduct of the business of waterborne transportation. Further, the carriers are directed to establish such regulations and practices in the same manner that the common carriers establish rates, fares, charges, (cargo) classifications, and tariffs. Last, by obvious implication of the concept of "common carriage", each and every category listed in the section was universally observed and made applicable by the common carrier to each and every passenger and cargo shippers.

As referenced earlier, during the 1970's and 1980's, every mode of passenger and cargo transportation in the United States – railroads, truck lines, air lines, and ocean carriers –underwent Congressional scrutiny and deregulatory legislation. Federal agency oversight provisions and regulatory powers were rolled back, and, in many cases, totally repealed in favor of allowing free competition and market place dynamics to control and level the playing field for all providers of transportation services and their respective consumers.

Following two rounds of railroad deregulation[28], Congress turned its deregulatory pen to the 1916 Act. The 1984 Act diminished the ability of steamship conferences to meet, agree on, and enforce common freight rates. Steamship lines were allowed to enter into individual contracts with cargo shippers. And of highest significance to our current inquiry, the power of the Commission to affirmatively correct unjust or unreasonable carrier behavior under section 17 - the second sentence of section 17, first paragraph, and the second sentence of section 17, second paragraph - were both repealed and thrown overboard.

Significantly, for purposes of the inquiry *sub judice*, it is important to note that the Commission's authority to determine a "regulation or practice" to be "unjust or unreasonable" carried over into section 10(d)(1) of the 1984 Act. However, the Commission's

[28] *See* the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210; Staggers Act of 1980, Pub. L. 96-448.

authority to "determine, prescribe and order enforced a just and reasonable regulation or practice" was eliminated in the 1984 Act.

Thus we come to the current Congressional formulation of Section 10(d)(1), the statutory provision in question.

> **SEC. 10. PROHIBITED ACTS**
> (d) Common Carriers, Ocean Transportation Intermediaries, and Marine Terminal Operators
> (1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

On its face, the language of Section 10(d)(1) , without context and without reference to any standard canons of statutory construction, could be subject to some degree of open reading. What is a "just regulation"? What is a "reasonable practice"? However, such concession does not mean that the Commission is thereby granted a clean "white board", untethered from any further inquiry and thus free to incorporate any creative interpretation that might suit its objective du jour. *Chevron* and the canons of statutory interpretation simply do not permit an agency to do whatever it wants.

Before we submerge into context and all related canons of construction, we must first consider the Syntactic Canon concerning grammar. In *Flora v. United States*, 362 U.S. 145 (1960), the Supreme Court concisely defined this canon:

> This Court does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principals of English prose as irrelevant to a construction of those enactments.

Id. at 150.

Reviewing section 10(d)(1) under this initial canon of construction, one can observe that the regulated entity is the subject of the sentence. The subject is directed – i.e. do not fail to – then comes the active verbs – "establish, observe, and enforce" just and reasonable regulations and practices. The regulated entity is ordered to, first, initiate the creation, dissemination, and publication of such just and reasonable regulations and practices, and simultaneously, to observe and enforce those regulations and practices that were created by that regulated entity. It tortures the construction to the point of absurdity to suggest, as the majority does, that by this language Congress was ordering the regulated entity to initiate and "establish" a regulation and practice that was already in existence out in the ancient and modern realm of both common and statutory *corpus juris*. Stated differently – why would Congress through this language in the Shipping Act be ordering or directing regulated entities not to fail to comply with all laws "established" (i) by all legislative bodies, and (ii) by common law courts in terms of common law duties? Such syntactic construction is obviously incorrect.

Some of the section's other terms are defined elsewhere in the statute, such as "common carrier", "ocean transportation intermediary", and "marine terminal operator". Such entities are required to file various forms and obtain various licenses from the Commission in order to operate in the foreign waterborne commerce of the United States. As regulated and licensed entities, certain of their activities are regulated by the Shipping Act. Other non-Shipping Act activities are regulated by other government agencies, such as the U.S. Coast Guard and Customs and Border Protection. And still other activities, such as various commercial activities, are subject to various federal and state laws and regulations.

Other terms that Congress used in both the 1916 and the 1984 versions of the Shipping Act, namely "regulations and practices", require additional steps in order to determine the Congressional meaning and intent. The next and most fundamental rule of statutory construction is the Ordinary Meaning Canon - the

words of a statute are to be taken in their natural and ordinary signification and import.[29]

The cases referenced in footnote 11 above and in the discussion of judicial interpretation of the phrase "practices" by multiple courts applying the Mann-Elkins Act, the Shipping Act of 1916, and other statutes, all utilized the Ordinary Meaning Canon to find the meaning of the term "practice" as intended by Congress.[30]

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[29] See, e.g., James Kent, *Commentaries on American Law* 432 (1826) "The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense." A recent Commission decision took a small first step toward addressing the statutory and technical meaning of "practice". (see *Bimsha*) Unfortunately, the parties in that case did not even begin a full and reasoned analysis of section 10(d)(1) of the 1984 Act. Thus, the Court was left with what amounted to a default judgment in favor of the Commission.

In most simple terms, the Second Circuit's review of the Commission's interpretation and application of section 10(d)(1) of the Act was governed by *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) and its well-known two-step process. The Court considered Step One, and being presented with no reasoned position from the appellant, moved easily into *Chevron* Step Two, with the predictable deference to agency interpretation. However; the Court took the most unusual step of commenting on the paucity of the appellant's presentation. See *Chief Cargo Services, Inc. v. Federal Maritime Commission, United States of America*, Summary Order, Case 13-4256, Document 54-1(2d Cir. 2014)"To the extent dissenters to the FMC's decision identified further reasons for doubting the agency's liability determination, Chief Cargo does not advance those contentions here, and thus we deem any such arguments abandoned." *Id*. at 5.

Thus the legal arguments that were advanced in the various cases cited in the opening section of this dissent and in the *Bimsha* case dissent in particular were judicially recognized as not presented by appellant to the Second Circuit, were deemed abandoned by the appellant, and therefore unavailable for further appeal. The Second Circuit's unusual note also established that the issues set forth in the *Bimsha* dissent together with its reasoning and legal analysis remain a matter of first impression for any federal reviewing court.

[30] *See Intercoastal Investigation*, 1935, 1 F.M.C 400 (1935); *Whitam v. Chicago, R.I.& P. Ry. Co.*, 66 F. sup 1014 (N.D. Tex. 1946); *McClure v. Blackshere*, 231 F. Supp. 678 (D. Md. 1964); *Stockton Elevators*, 8 F.M.C. 187 (1964); and

All came to a reasoned conclusion that confirms the minority position and further, that stands in direct opposition to the majority position.

C. LEGISLATIVE AND JUDICIAL HISTORY

As we begin to review the legislative and judicial history of the Shipping Act - both the 1916 original enactment and the 1984 re-enactment - and where section 10(d)(1) properly fits within that analysis, the full text of the Statute, together with the context of the phrase must be kept in mind. The Whole-Text Canon is a fundamental concept in interpreting a legal phrase and in finding Congressional intent. As Justice Scalia has written, "[c]ontext is a primary determinant of meaning . . . . The entirety of the document thus provides the context for each of its parts."[31] This rule of construction has deep roots in our jurisprudence. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), Chief Justice John Marshall invoked the rule in an early case concerning the United States Constitution where he called for "a fair construction of the whole instrument." *Id.* at 406. In a more contemporary case, *Panama Ref. Co. v. Ryan*, 293 U.S. 388,439 (1935), Justice Cardozo stated, "[t]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Id.* at 439. Returning to Justice Scalia in *United Sav. Ass"n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.* 484 U.S. 365 (1998) for a more recent gloss, Scalia in that case referred to statutory construction as a "holistic endeavor." *Id.* at 371.

1. Pre-1984

The text and heritage of the statutory language itself provides compass direction as to Congressional intent. Justice Frankfurter expressed the maxim as, "[I]f a word is obviously transplanted from another legal source, whether the common law or

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European Trade Specialists, 19 S.R.R. 59 (FMC 1979).

[31] Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (1st ed. 2012).

other legislation, it brings the old soil with it."[32] In *United States Navigation Co. v. Cunard S.S. Co. Ltd.*, 284 U.S. 474 (1932), the U.S. Supreme Court tied a tight knot binding the ICA and the 1916 Act. The Court gave a general review of the various sections of the 1916 Act, including Section 17 - the predecessor to section 10(d)(1) of the 1984 Act, and ruled that:

> [t]hese and other provisions of the Shipping Act clearly exhibit the close parallelism between the act and its prototype, the ICA, and the applicability both of the principals of construction and administration.

Id. at 484.

In *Baltimore & Ohio Railroad Company v. United States*, 277 U.S. 291 (1923), the U.S. Supreme Court considered the question of what constituted a "practice" within the contemplation of Congress in the ICA. The dispute concerned the division of rates and revenue between eastern railroads, western railroads, and a jointly owned company that operated the bridge spanning the Mississippi River. The Court ruled that the rate and revenue division was not a practice, and utilized the following canon of construction:

> The word "practice", considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it.

Id. at 299-300 (citation omitted).

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[32] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

The Court concluded with the observation, "even if the matter in controversy were a "practice" within the meaning of the act, the [ICC] would not be authorized to set it aside without evidence that it is unjust and unreasonable." *Id*. at 300

The Court was employing the common canon of construction that associated words bear on one another's meaning. Specifically, the Court is holding that the meaning and application of the word "practices" must be narrowly confined to the class of words associated with it. In *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312 (1977), the U.S. Supreme Court articulated the Associated Words Canon where Justice Stevens held, "words grouped in a list should be given related meanings." *Id.* at 322.[33]

As one reviews the construction of the 1910 Mann-Elkins amendment to the ICA and the words that juxtapose and surround the term "practice", the association cannot be missed – much less ignored. Consider:

> [E]stablish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs . . . and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.[34]

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[33] *See also City of Fort Worth v. Cornyn*, 86 S.W.3rd 320, 327 (Tex. App.-Austin 2002)("The doctrine of construction – *noscitur a sociis* – teaches that "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute, and that where two or more words of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations and give color and expression to each other." (citation omitted).

[34] Mann-Elkins Act, 61st Congress, 2nd Session, ch. 309, 36 Stat. 539, enacted June 18, 1910.

The Associated Words Canon requires that the meaning of "practice" to be confined in this case to a context similar to a rate, a tariff provision, a cargo classification, or related regulation "made or prescribed" by the common carrier and thereby imposed and made applicable to the cargo shipper community as a whole.

A few years later, the United States Shipping Board Bureau (USSBB), a predecessor to the Commission, considered the term "practice" as used in the 1916 Act in *Intercoastal Investigation, 1935*, 1 FMC 400 (1935), an investigation that covered sixteen years of steam ship conference activities. The USSBB held:

> The provisions of the Shipping Act, 1916, also apply to these respondents. It is there provided . . . that carriers shall establish, observe, and enforce just and reasonable rates, charges, (cargo) classifications, and tariffs and just and reasonable regulations and practices related thereto . . .The terms "rates", "charges", "tariffs", and "practices" as used in transportation have received judicial interpretation . . . Owing to its wide and variable connotation, a practice, which unless restricted ordinarily means an often repeated and customary action, is deemed to apply only to acts or things belonging to the class as those meant by the words of the law that are associated with it. . . . In section 18, the term "practices" is associated with various words, including "rates", "charges", and "tariffs".

Id. at 431-432 (emphasis added).[35]

Thus the Commission employed both the Ordinary Meaning Canon and the Associated Words Canon of construction and found

[35] *Intercoastal Investigations* cited two ICA railroad cases as authority. See *Baltimore & Ohio Railroad Company v. United States*, 277 U.S. 291 (1923) and *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 257 (1931).

that the application of the term "practices" must be confined within transportation's specialized lexicon. "Rates", "charges", cargo "classifications", "tariffs", and "practices" are all transportation specific terms that the common carrier applies uniformly to the passenger and cargo shipper community. Specifically, the USSBB held that "practices" meant "an often repeated and customary action". *Id.* at 432.

A decade later, in *Whitam v. Chicago R.I. & P. Ry. Co.*, 66 F. Supp. 1014 (N.D. Tex. 1946),
a federal trial court considered the term "practice" as used in the ICA and held that, "[the] word a 'practice' as used in the decision, or used anywhere properly, implies systematic doing of the act complained of . . ." *Id.* at 1017.

Eleven years after Congress enacted the Mann-Elkins amendment and five years after replanting that same soil into the 1916 Act, Congress used near identical language in another statute. In *McClure v. Blackshere*, 231 F. Supp. 678 (D. Md. 1964), a federal trial court considered the term "practice" as used in § 208 of the Packers and Stockyards Act of 1921[36] and, by use of the Ordinary Meaning Canon, offered the following reasoning and conclusion:

> [W]hile conceivably a consistent course of conduct, even with respect to nonpayment of bills, might in time become a "practice", it is difficult to see how a single instance of the nonpayment of a bill could be so denominated. "Practice" ordinarily implies uniformity and continuity, and does not denote a few isolated acts, and uniformity and universality,

[36] The Packers and Stockyards Act of 1921 was passed to maintain competition in the livestock industry. The Act bans discrimination, manipulation of price or weight, livestock or carcasses; commercial bribery; misrepresentation of source, condition, or quality of livestock; and other unfair or manipulative practices. § 208 of the Packers and Stockyards Act of 1921 provides that "[i]t shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services …." 7 U.S.C. § 208.

> general notoriety and acquiescence must characterize the actions on which the practice is predicated.

Id .at 682.

The Commission considered a marine terminal dispute in 1962, where the terminal had overcharged for demurrage in one shipment and then refused to refund the overcharge to the shipper. Instead, the terminal applied the refund amount to an alleged prior outstanding debt owed by the shipper. In *J.M. Altieri v. Puerto Rico Port Authority*, 7 F.M.C. 416 (ALJ 1962), the shipper filed an action to recover the overpayment and the ALJ denied the claim based on the following reading and application of section 17, second paragraph, part A:

> The unjust and unreasonable practices condemned by section 17 are those, in the words of the statute, "relating to or connected with the receiving, handling, storing or delivering of property." The practices that are intended to fall within the coverage of this section are shipping practices. It is these practices and only these that were assigned to the special expertise of the Agency. . . .
> [R]espondent has unilaterally effected an offset of monies admittedly owing to complainant against a disputed claim. . . . The categorical statement . . . that respondent had a right to withhold the refund and offset it against the other claim is without foundation. This unlawful act of respondent, if it is one, may provide the basis for an action in court; but it is not necessarily a violation of section 17.
> The dispute is over the question whether respondent must refund an overpayment. The issues incident to this question would be exactly the same if the overpayment were on the purchase price of groceries. They are not so peculiar to shipping matters that they require or warrant the intervention of the Commission. A court can handle all aspects of these issues. That is not to say, of course, that court and agency actions are always mutually exclusive.

> If the action of respondent were one of a series of such occurrences, a *practice* might be spelled out that would invoke the coverage of section 17.

Id. at 419-20 (emphasis in the original)

In the same year that the *McClure* federal court decision was decided, the Commission considered the *Stockton Elevators* case.[37] In the most complete case in which the full Commission analyzed the meaning of section 17 of the 1916 Act and the meaning of the term "practice", the Commission issued a decision that is four square on point and is diametrically opposed to the current majority position.

Stockton Elevators operated an export terminal on the West coast that was experiencing incoming rail car congestion. It had granted a variance to its published tariff in favor of a customer on five transactions so as to expedite the sale and unloading of the trains. The alternative was to begin diverting incoming loaded trains to holding yards some distance from the terminal facility. A competitor complained that Stockton Elevators had violated section 17 of the 1916 Act. The Commission held:

> [I]t cannot be found that the Elevator engaged in a "practice" within the meaning of Section 17. The <u>essence of a practice is uniformity</u>. It is <u>something habitually performed</u> and <u>implies continuity</u> . . . the usual course of conduct. It is <u>not an occasional transaction</u> as here shown. . . .

Id. at 200-201.[38]

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[37] *Stockton Elevators*, 8 F.M.C. 187 (1964).

[38] Cited therein as prior judicial precedent and authority for this general proposition are a number of cases from different courts and commercial contexts, including railroad, shipping and manufacturing cases: "*Intercoastal Investigation*, 1935, 1 F.M.C 400, 432 (1935); *B&O By. Co. v. United States*, 277 U.S. 291, 300 (1928); *Francesconi & Co. v. B&O Ry. Co.*, 274 F 687, 690; *Wells Lamont Corp. v. Bowles*, 149 F. 2d 364." *Id.*

The second relevant finding was "[e]ven if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred. *Id.* [39]

Some fifteen years following the *Stockton Elevator* investigation and a short five years prior to the Congressional passage of the 1984 Act, the full Commission again considered section 17 of the 1916 Act and addressed the precise question of the term "practice". In *European Trade Specialists v. Prudential-Grace Lines,* 19 S.R.R. 59 (FMC 1979), a unanimous Commission held:

> Even assuming, without deciding, that European was not notified of the classification and rating problem, we cannot say that such conduct by Hipage amounts to a violation of Section 17. Unless its normal practice was not to so inform the shipper, such adverse treatment cannot be found to violate the section as a matter of law.

Id. at 63 (emphasis on "practice" in the original)(emphasis on "matter of law" added). The Commission continued:

> Similarly, because any violation of section 510.23 of the Commission's regulations must be considered in terms of Section 17 by operation of the language of the Order on Remand, without a showing of continuing violations of these regulations, no Section 17 violation can be found.

Id. (emphasis added).

This section describes the judicial record and legislative context in existence when Congress took up the task of considering

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[39] The Commission utilized both prior Commission case law and federal court application of "practices" within the ICA. *Stockton Elevators* cited: "*Intercoastal Investigation*, 1935, 1 F.M.C 400, 432 (1935); *B&O By. Co. v. United States*, 277 U.S. 291, 300 (1928); *Francesconi & Co. v. B&O Ry. Co.*, 274 F 687, 690; *Wells Lamont Corp. v. Bowles*, 149 F. 2d 364. *Stockton Elevators* at 618.

the reform of the 1916 Act and then enacting the 1984 Act. As discussed above, Congress was deregulating all modes of transportation during this period. Several points of disagreement between my position and the majority position are revealed at this juncture in the legislative and judicial history of section 10(d)(1) of the 1984 Act.

2. Congress enacts the Shipping Act of 1984

To restate my initial proposition – we are looking for reasonable indications of Congress's intent with regard to a word and phrase it used in a statute. As the Supreme Court held in *Chevron*, "If the intent of Congress is clear, that is the end of the matter . . . ." *Chevron*, 467 U.S. at 842-843. Aside from the near exact mirror image of the Mann-Elkins Act language and Section 17 of the 1916 Act, lets again consider Section 17 of the 1916 Act and Section 10(d)(1) of the 1984 Act with a reasonable edit that does no injury to the syntax or semantical sense of the two provisions.

> The relevant portion of Section 17 of the 1916 Act provides that: "[Every regulated entity shall] establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property.
>
> Section 10(d)(1) of the Shipping Act of 1984 provides that: [No regulated entity may fail to] establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property.

Any argument that these two provisions are different – in any legally or logically relevant manner – lacks reason, foundation, or plausibility.

The Prior-Construction Canon has strong support from the U.S. Supreme Court. In *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998), Justice Kennedy wrote, "[W]hen administrative and judicial interpretations have settled the meaning of an existing statutory

provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well. Id. at 645 (emphasis added).

The Prior-Construction Canon provides another solid foundation for my position that Congressional intent as to the meaning, interpretation and construction of the phrase "establish, observe, and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivery of property" is clear and unambiguous. Congress used the same 1916 Shipping Act language in the new 1984 Shipping Act. The Commission's holdings in *Intercoastal Investigation, 1935*, 1 F.M.C. 400 (1935), the case law, including ICA federal court cases, cited therein as supporting precedent[40], *Altieri*,[41] *Stockton Elevators*[42], the case law, including ICA federal court cases, cited therein as supporting precedent, and *European Trade*[43] was incorporated into the new statute as well.

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[40] *Intercoastal* at 432.

[41] *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416 (ALJ 1962)("If the action of respondent were one of a series of such occurrences, a *practice* might be spelled out that would invoke the coverage of section17. *Hecht, Levis and Kahn, Inc. v. Isbrandtsen, Co., Inc.*, 3 F.M.B. 798 (1950). However, the action of the respondent is an isolated of 'one shot' occurrence. Complainant has alleged and proved only the one instance of such conduct. It cannot be found to be a 'practice' within the meaning of the last paragraph of section 17." Id.at 420. (emphasis in original).)

[42] *Stockton Elevators* at 618 ("It cannot be found that the Elevators engaged in a 'practice' within the meaning of section 17. The essence of a practice is uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct. It is not an occasional transaction such as here shown. *Intercostal Investigation, 1935*, 1. USSBB 400, 432; *B&O Ry. Co*., 274 F. 687, 690; *Whitham v. Chicago R.I. & P. Ry. Co*., 66 F. Supp. 1014; *Wells Lamont Corp. v. Bowles*, 149 F.2d 364.")

[43] *European Trade Specialists* at 63. ("Even assuming, without deciding, that European was not notified of the classification and rating problem we cannot say that such conduct by Hipage amounts to a violation of Section 17. Unless it normal *practice* was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 181, 200 (3 S.R.R. 605)(1964)"(emphasis in original).

The majority first attempts to distinguish *Stockton Elevator* and *European Trade* in their *Kobel* Remand Order, 32 S.R.R. 1720 (FMC 2013), where the majority asserts:

> *Stockton Elevators* was not a case that discussed whether the respondent's regulations and practices in question were "unjust or unreasonable", but whether five specific instances of transactions violated section 17 of the Shipping Act of 1916.

Id. at 1732.

First, the majority's assertion is a *non sequitur*, in that it has no relationship to the question of whether Stockton Elevators engaged in a "practice" of granting exceptions to its filed tariff rate. More importantly, the majority's assertion is not merely incorrect, it is directly contradicted by the Commission's published report. The final report, *Investigation of Certain Practices of Stockton Elevators*, 3 S.R.R. 605 (1964), considered exceptions filed by the Commission's Hearing Counsel to the Commission Examiner's initial decision. The Commission ruled as follows:

> The Examiner concluded that neither the Elevator nor Mitsui had participated in any act which was unfair, unjust or unreasonable within the meaning of Sections 16 and 17 and that the proceedings should be discontinued . . . . The exceptions are in the nature of general conclusions that Stockton Elevators . . . engaged in a practice which was unjust and unreasonable in violation of Section 17 of the Act; . . . and in arranging wharfage at a reduced rate, engaged in an unjust and unreasonable practice in violation of Section 17.

Id. at 606.

The Commission then adopted the Examiners Decision as its own and made it a part of the final Investigation Report, including the Examiner's final statement:

> ULTIMATE CONCLUSION. Regardless of other legal points raised, there has been no showing that either respondent participated in any act which was unjust, unfair, or unreasonable. The proceeding should be discontinued.

Id. at 618

The majority in the case *sub judice* places full reliance for support of its position upon the change that Congress made to the old Section 17 language when it reenacted that language in the new Section 10(d)(1) of the 1984 Act. In the *Kobel* Remand Order, 32 SRR 1720 (FMC 2013), the majority offered the following rational as they dismissed, if not outright rejected, prior federal court decisions and the Commission's prior unequivocal and authoritative rulings on Section 10(d)(1):

> *Stockton Elevators* discussed section 17. . . of the Shipping Act of, 1916, language of which is different from section 10(d)(1) of the Shipping Act of 1984. As discussed below, section 17 of the Shipping Act, 1916 stated, "[w]henever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." (cite omitted) That language, however, was later removed from the legislation of the Shipping Act of 1984, and section 10(d)(1) does not contain it. (cite omitted) Therefore, although *Stockton Elevators* discussed the predecessor to section 10(d)(1), it did not discuss the same statutory language in the same context as section 10(d)(1) and thus is not directly precedential in the analysis of section 10(d)(1) (footnote omitted).

Id. at 1732 (emphasis added).

The majority's Remand Order, 32 SRR 1720 (FMC 2013), then moves to *European Trade Specialists* and simply bootstrapped its prior argument as follows:

> As *Stockton Elevators* discussed above, *European Trade Specialists* discussed section 17 of the Shipping Act, 1916, which gave the predecessor to the Commission an authority to "determine, prescribe, and order enforced a just and reasonable regulation or practice," whenever it finds any regulation or practice unjust or unreasonable. Therefore, *European Trade Specialists* also discussed different statutory section with different context and is not directly precedential in the analysis of section 10(d)(1).

Id. at 1733 (emphasis added).

While I am left flummoxed by the majority's attempt to distinguish prior controlling precedent, the majority ignores two rather glaring problems with its reasoning. First, neither *Stockton Elevators* nor *European Trade Specialists* made any reference in any manner whatsoever - to that portion of section 17, second paragraph, part B of the 1916 Act that deals with the Commission's authority to "determine, prescribe, and order enforced a just and reasonable regulation or practice," whenever it finds any regulation or practice unjust or unreasonable – not a single word. Why? Because the issue of the Commission determining and ordering enforced an agency initiated and crafted "regulation and practice" was never alleged, never discussed, nor offered as a potential remedy. Second, and far more logically compelling, is precisely the historical context in which Congress excised and thus repealed the second sentence (i.e. part B) of the second paragraph of section 17 of the 1916 Act. As discussed above in Section VI, A, Purpose, Congress was deregulating all modes of transportation in the 1980s. This Congressional deregulation process meant reducing and removing the scope of authority and regulatory "footprint" of all federal transportation regulatory agencies. The Commission was subjected to the same deregulatory knife.

This actual statutory history points towards a totally different conclusion. Congress moved the first sentence (part A) of the second paragraph of Section 17 of the 1916 Act over to the new 1984

Shipping Act wholly in good form. That language – requiring that no regulated entity may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property - is now found in section 10(d)(1) of the 1984 Act. The second sentence, the one to which the majority refers in the Koble remand Order, that portion having to do with the Commission's authority to "determine, prescribe, and order enforced a just and reasonable regulation or practice," whenever it finds any regulation or practice unjust or unreasonable (what I call "part B" of the second paragraph of section 17) - was indeed removed and thus repealed, meaning that Congress intended to diminish and truncate the Commission's statutory authority to address regulated entity activity as regards their compliance with the provision; "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Therefore, according to a reasoned application of both clear legislative fact combined with the majority's position, Congress intended, and in fact did reduce the Commission's statutory authority by repealing part B, the second sentence of the second paragraph of section 17. However, with the very same stroke of the legislative pen, Congress intended to significantly increase the Commission's statutory authority, scope, and reach in part A, first sentence of the second paragraph of section 17 via a new and substantially expanded reading, interpretation, and application of the now denominated section 10(d)(1) of the 84 Act. Such a conclusion lacks any foundation and is beyond quizzical – it is implausible.

The next traditional rule of statutory interpretation that offers strong guidance on the original intent of Congress and that the majority fails to consider is the Presumption of Consistent Usage. In *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427 (1932), the U.S. Supreme Court framed this canon of construction as follows, "[t]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. *Id.* at 433 (emphasis added).

In the 1984 Shipping Act, Congress used the term "practice" or "practices" eight times in in three different sections of the new legislation: Section 5 (Agreements); Section 8 (Tariffs); and Section 10 (Prohibited Acts).

Congress first uses the term "practices" in section 5(f) Maritime Labor Agreements, of the 1984 Act, as follows:

> This subsection does not exempt from this Act any rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, or are essential terms of a service contract whether or not those rates, charges, regulations, or practices arise out of, or are otherwise related to a marine labor agreement. 46 U.S.C. Section 40301(d) [emphasis added].

The Shipping Act next uses the term "practices" in section 8(a)(1) addressing tariffs as follows:

> Section 8(a)(1) – [e]ach common carrier and conference shall keep open to public inspection …, tariffs showing all its rates, charges, classifications, rules, and practices, between all points or ports on its own route and on any through transportation route that has been established." 46 U.S.C. Section 41104(2)(A) [emphasis added].

These usages of "practice" are in complete harmony with the original 1910 Mann-Elkins Act and the original section 17 of the Shipping Act of 1916 usage of "practices" referenced above.

Then, in section 10, the Prohibited Acts section of the Shipping Act, the term "practices" is used in six sub-sections. In five cases, the term's usage is consistent with the plain and ordinary meaning, i.e. an act or omission by the regulated party that is performed as its Normal, Customary, & Continuous method of

conducting business with shippers and cargo representatives. Consider the following:

> Section 10(b)(2)(A) – No common carrier, either alone or in conjunction with any other person, directly or indirectly, may: (2) provide service in the liner trade that: (A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act unless excepted or exempted under section 8(A)(1) or section 16 of this Act. 46 U.S.C. Section 41104(2)(A) [emphasis added].
>
> Section 10(b)(4) – No common carrier, either alone or in conjunction with any other person, directly or indirectly, may: (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of: (A) rates or charges; (B) cargo classifications; (C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (D) the loading and landing of freight; or (E) the adjustment and settlement of claims. 46 U.S.C. Section 41104(4) [emphasis added].[44]
>
> Section 10(b)(5) – No common carrier, either alone or in conjunction with any other person, directly or

[44] The Administrative Law Judge in *William J. Brewer, v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc., 28 SRR 1331 (ALJ 2000)* noted that "[t]he Commission observed that a persistent pattern of quoting rates and failing to file them could constitute a violation of . . . section 10(b)(4)(A), which forbids carriers from engaging in unfair practices in the matter of rates. See *Martyn Merritt – Possible Violations of Shipping Act of 1984*, 25 SRR 1495, 1500 (1991)." *Id.* at 1334 (emphasis added).

> indirectly, may: (5) for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port. 46 U.S.C. Section 41104(5) [emphasis added].
>
> Section 10(c)(3) – No conference or group of two or more common carriers may: (3) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier. 46 U.S.C. Section 41105(3) [emphasis added].
>
> Section 10(c)(7) – No conference or group of two or more common carriers may: (7) for service pursuant to a service contract, engage in any unjustly discriminatory practice in the matter of rates or charges with respect to any locality, port, or persons due to those persons' status as shippers associations or ocean transportation intermediaries…. 46 U.S.C. Section 41105(7) [emphasis added].
>
> Section 10(d)(1) – No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. 46 U.S.C. Section 41102(c) [emphasis added].

As recently as *Altieri, Stockton Elevators,* and *European Trade Specialists* as discussed above, and in *A.N. Deringer*[45], and

[45] *See A.N. Deringer, Inc. v. Marlin Marine Services, Inc*., 25 SRR 1273 (ALJ 1990). "In any case, the sustaining of an alleged violation of 10(d)(1) requires more than a showing of unjust and unreasonable activity. It requires that the

Kamara,[46] the Commission likewise used the term "practice" in a consistent manner for all the places it appears in the Shipping Act. However, the Commission has now redefined "practice" to mean something entirely different in section 10(d)(1) – i.e. a "practice" is established by the transportation industry's normal method of conducting business, including the common custom – translation, "duty" – of complying with all statutes and common law duties. Further, any single failure to comply and observe such duty is a violation of section 10(d)(1). The newly discovered meaning is starkly discordant and jarringly out of harmony with the clear usage and common sense application of "practice" in every other section in the statute. Thus the majority construction runs directly counter to the canon of interpretation that a term should be given a consistent definition and construction within a statute or section. Further, the Associated Words Canon, discussed above, is again applicable in the re-enacted version of Section 17 / section 10(d)(1).

3. Post 1984 Commission Jurisprudence and the Decisional Drift/Shift/Change/Overruling of *Intercoastal Investigation/Altieri/ Stockton Elevators/European Trade*

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complainant prove failure: 'to establish, observe, and enforce just and reasonable *regulations and practices*….' Marlin's failure to specify on the bill of lading the number of boxes hardly demonstrates any shortcomings in this area. If Marlin did act improperly, only the existence of an isolated error has been demonstrated. Nothing in the record casts light upon its regulations and practices, and this constitutes a fatal flaw in Deringer's case." *Id*. at 1276 (emphasis in original).

[46] *See Kamara v. Honesty Shipping Service*, 29 SRR 321(ALJ 2001)("…it is not clear that a carrier's simple failure to remit payment to a subcontracting carrier constitutes a Shipping Act violation, although the shipper would certainly have a commercial contractual claim. A series of cases alleging Section 10(d)(1) violations has established that a complainant must demonstrate regulations and practices , as opposed to identifying what might be an isolated error or understandable misfortune. See, for example Informal Docket No. 1745(I), *Mrs. Susanne Brunner v. OMS Moving Inc.*, slip decision served January 27, 1994, administratively final March 8, 1994. In the present case, however, despite the Settlement Officer's request, the complainants failed to either cite a specific statutory violation or attempt to describe a relevant pattern of behavior.") *Id*. at 322. N 8.

In *A.N. Deringer, Inc. v. Marlin Marine Services, Inc*., 25 SRR 1273, 1276, 1277 (FMC 1990), a post 1984 case that followed the *Altieri, Intercoastal Investigation, Stockton Elevators, European Trade Specialists* line of precedent in a case considering section 10(d)(1), the ALJ dismissed claims regarding missing cargo with the following ruling:

> [t]he sustaining of an alleged violation of Section 10(d)(1) requires more than the showing of unjust or unreasonable activity. It requires that the complainant prove failure ". . . to establish, observe, and enforce just and reasonable *regulations and practices* . . ." Marlin's failure to specify on the bill of lading the number of boxes hardly demonstrates any shortcomings in this area. If Marlin did act improperly, only the existence of an isolated error has been demonstrated. Nothing in the record casts light upon its regulations or practices, and this constitutes a fatal flaw in Deringer's case.

Id. at 1276 (emphasis on "regulations and practices" in the original, other emphasis added).
The ALJ continued:

> It is clear that C.O.G.S.A. was enacted to clarify the responsibilities as well as the rights and immunities of carriers and ships with respect to loss and damage claims. Consequently, the use of the Shipping Act of 1984 to circumvent C.O.G.S.A provisions would constitute a wholly unwarranted frustration of Congressional intent. Furthermore, some of the logical conclusions of such a step would be absurd. For example, C.O.G.S.A provides a one-year period for the filing of suit; after that period, a claim is time barred. To accept Deringer's premise, one would have to conclude that a one-year period exists during which a claimant may file suit, but two additional years exist in which to file with the FMC. Inasmuch as C.O.G.S.A

> stipulates that the carrier and ship, in the absence of a suit, are discharged from liability after one year, such a conclusion is unacceptable.

Id. at 1277 (footnotes omitted).[47]

The Commission's case law regarding section 10(d)(1) of the 84 Act first steered out of the established navigation channel with the 1991 decision in *Adair v. Penn-Nordic Lines, Inc.*, 26 SRR 11 (ALJ 1991). The case involved a *pro se* claimant who contracted with a freight forwarder, who then contracted with Penn-Nordic Line for the shipment of a single motorcycle from the U.S. to New Zealand. Adair paid the freight forwarder; however, the freight forwarder did not pass such payment over to Penn-Nordic. The motorcycle had been delivered to a U.S. port warehouse, but never moved further. The complaint was filed under the Commission's informal docket procedures, i.e. small claims process.

My dissent in the *Kobel* Remand Order, 32 SRR 1720 (FMC 2013), discusses this initial "springboard" decision at some length[48] and I will only summarize main points here.

- The motorcycle moved overland to a U.S. port warehouse and no further. It was never even touched by an ocean common carrier. Therefore, the subject matter jurisdiction of the Shipping Act was never shown or established.
- The Commission's ALJ stated that Adair could file his suit in "a court of law" in Washington State and use one or all legal theories from contract law, tort law or agency law.
- The ALJ *sua sponte* suggested that Adair amend his complaint to allege a violation of Section 10(d)(1) of the 84 Act.

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[47] In addition, with any COGSA litigation, the parties pay their own legal fees. In a Shipping Act claim, the successful claimant wins full reparation and the award of attorney fees.

[48] *Kobel*, 32 SRR at 1757-1758.

- The ALJ ruled, "I find that the record shows both respondents to have acted unreasonably."[49]
- The ALJ found respondents "liable for the monetary injury inflicted on Adair as a result of their unreasonable conduct".[50]
- The ALJ concluded, "The above litany of misconduct . . . amply demonstrates that Penn-Nordic failed to 'establish, observe, and enforce just and reasonable practices relating to or connected with receiving, handling, storing, or delivering of property."[51]
- The ALJ continued, "The facts . . . show that Penn-Nordic behaved unreasonably under Section 10(d)(1) . . . this conduct would undoubtedly have contravened other standards of law principals of contract law and common carrier law applicable in courts of law and . . . Adair could have obtained relief . . . in a court of law or perhaps admiralty . . . "[52]
- The ALJ's legal epistle continued with a review of sixteen principals of contract law, six principals of admiralty law including COGSA and six principals of agency law.[53]
- The ALJ continued his summation, "The application of the above principals of admiralty, contract, and agency law becomes apparent when considering the facts of this case.[54]
- The ALJ further concluded, "[t]herefore, this record amply demonstrates that Penn-Nordic behaved unreasonably and in violation of Section 10(d)(1)."[55]
- The ALJ further concluded, "[a]s an agent and fiduciary of . . . Adair, [the freight forwarder] did not maintain the standard of care required by [common agency] law of such fiduciaries nor fulfill its duties to . . . Adair. Consequently, I

[49] *Adair*, 26 SRR at 19.
[50] *Adair*, 26 SRR at 15.
[51] *Adair*, 26 SRR at 20.
[52] *Adair*, 26 SRR at 20.
[53] *Adair*, 26 SRR at 20-21.
[54] *Adair*, 26 SRR at 21.
[55] *Adair*, 26 SRR at 22 (emphasis added).

conclude that Corporate World [freight forwarder] failed to observe just and reasonable regulations and practices, in violation of Section 10(d)(1) of the 1984 Act."[56]

- The ALJ offered another lengthy review of the common law of agency and freight forwarder's fiduciary duties, and then again concluded, "Freight forwarders have been held liable under admiralty and negligence law in suits brought before federal courts because of the breach of their fiduciary duties towards their shipper-principals."[57]
- Again and finally concluding, the ALJ held, "I find that Corporate World [freight forwarder] failed to exercise the standard of care and diligence which the [common agency] law requires of fiduciaries . . . and that Corporate World [freight forwarder] failed to observe just and reasonable regulations and practices with regard to the shipment . . . in violation of Section 10(d)(1) of the 1984 Shipping Act."[58]

Note that the ALJ focused on behavior that he deemed to be unreasonable by virtue of common law proscriptions and various federal statutes including COGSA.[59] He misstated the 1984 Act in that he ignored the two terms "establish" and "enforce" and

[56] *Adair*, 26 SRR at 22 (emphasis added).
[57] *Adair*, 26 SRR at 23.
[58] *Adair*, 26 SRR at 24 (emphasis added).
[59] The ALJ cited record evidence that could have easily brought the entire matter under other sections of the 1984 Act. Of most relevance here, there was evidence that the case was centered on cargo misdescription and a "practice" of same by the freight forwarder. "Penn-Nordic discovered that the shipment was not used household goods but rather a motorcycle and that Penn-Nordic had no specific rate for motorcycles in its tariff. . . . . [A]ccording to [Penn-Nordic], the [freight forwarder] misdescribed the shipment and the cubic measurement on the shipment and on shipments it had booked with Penn-Nordic in the past. . . . [A]ccording to Penn-Nordic, the [freight forwarder] had 'knowingly misdeclared this shipment to get himself a lower rate as this is his practice.' " *Adair*, 26 SRR at 16 (emphasis added). Thus the entire Adair case could have been resolved squarely within the *Intercoastal Investigation/Altieri/Stockton Elevators/European Trade/Deringer* line of section 10(d)(1) case law or under section 10(a)(1) of the 1984 Act that prohibits use of false cargo classification to obtain a lower transportation rate in any single transaction.

condensed that element down to the phrase, "failed to observe". This shorthand treatment of the statutory phrase would quite likely be embraced by the majority since it, in most simple fashion, eliminates all of the twisting and hopscotching in their deconstructing of the statute.

With Mr. Adair's *pro se* representation, supported by zealous counsel from the ALJ, and amid the sixteen dense and tightly spaced pages of the *Adair* decision, there is not a single reference to any Commission precedent or federal court interpretation of the statutory language of Section 10(d)(1) of the 1984 Act or its predecessor provision in the 1916 Shipping Act, section 17. Pointedly, there was no acknowledgement, to paraphrase the Commission's clearly articulated requirement in *European Trade Specialists* that, "[u]nless its normal practice was to [fail to comply with the law of contract, law of torts, law of agency, law of admiralty], such adverse treatment cannot be found to violate the section [Section 17 of the 1916 Act / Section 10(d)(1) of the 84 Act] as a matter of law."[60]

The majority further relies on a series of cases for their proposition that a single failure to "observe and enforce just and reasonable regulations and practices" is a violation of section 10(d)(1) of the 84 Act. In the case *sub judice* and the follow-on cases cited in the preamble to this minority dissent, the majority has cited the following cases, listed in chronological order, as supporting precedent.

Citing *Maritime Service Corporation v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655 (ALJ 1978), aff'd 18 S.R.R. 853 (FMC 1978), a 1978 Commission case, as support for its position that failure to fulfill common law or statutory obligations in a single incident is all that is needed to find the regulated party has engaged in an unjust and unreasonable practice, the majority ignores the dissent's discussion in *Bimsha International v. Chief Cargo*

[60] *See European Trade Specialists*, 19 SRR at 63.

Services, 32 SRR 1861 (FMC 2013), that points out the clear error in that reliance.[61] In fact, in *Maritime Services Corporation*, the full Commission considered the Section 17 allegations and findings and then expressly dismissed and rejected all counts of Section 17, 1916 Act violations.[62] Thus, the *Maritime Services Corporation* case stands as both a rejection of the majority position and an affirmance of my minority position

Following the *Adair* decision, the Commission next relies upon *Tractors and Farmers Equipment v. Cosmos Shipping*, 26 SRR 799 (ID 1992), for precedential support. As fully discussed by the dissent in the *Kobel* Remand Order, 32 SRR 1720 (FMC 2013), the entire case could and should have been handled under other FMC regulations that directly prohibited the alleged activity.[63] Instead, once again the ALJ *sua sponte* ordered the parties to amend their complaint to include section 10(d)(1) of the 1984 Act. When the complainant failed to so amend the complaint, the ALJ *sua sponte* amended the complaint on the parties behalf to include an allegation of violation of section 10(d)(1) of the 84 Act. Then, with a full thumb on the scale, the ALJ found a violation of section 10(d)(1) of the 84 Act. Again, not a single reference to Commission precedent and case law that required a finding of a Normal, Customary, & Continuous practice is found in the *Tractors and Farmers* decision.

The Commission next relies on *Symington v. Euro Car Transport, Inc.*, 26 SRR 871(ID 1993), as precedent. Again, as more fully discussed by the dissent in the *Kobel* Remand Order, 32 SRR

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[61] *See Bimsha International v. Chief Cargo Services*, 32 SRR at 1872 (FMC 2013).

[62] *See Sea-Land Service v. Acme Fast Freight*, 18 SRR 853 (FMC 1978))"[W]e conclude that the Presiding Officer's findings and conclusions …were erroneous with respect to the Section … 17 violations." Note:by substitution of complainant parties, FMC proceeding No. 73-3, *Maritime Service Corporation v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655 (ALJ 1978), was renamed *Sea-Land Services, Inc., et al v. Acme Fast Freight of Puerto Rico*, 18 S.R.R. 853 (FMC 1978).

[63] *Bimsha*, 32 SRR at 1759.

1720 (FMC 2013),[64] the same ALJ who decided the *Adair* and *Tractor and Farmers* cases took a simple, single automobile shipment from the US to England that could and should have been adjudicated under sections 10(b)(6) and 10(b)(12) of the 1984 Act, once again ignored traditional concepts of judicial modesty, economy, and restraint, and found that a single breach of an oral contract to be a violation of section 10(d)(1) of the 84 Act.

Next in the line of the majority's line of cases is *Total Fitness Equipment, Inc. d/b/a/ Professional Gym v. Worldlink Logistics, Inc.*, 28 SRR 45 (ID 1997). This is yet another case where the ALJ who earlier decided the *Adair, Tractor and Farmers, and Symington* cases took a complaint involving the "Filed-Rate Doctrine"[65] and misdescription of cargo by an NVOCC for violating sections 10(b)(1) and 10(b)(6) of the 1984 Act and inserted a section 10(d)(1) count on top of the other allegations. Interestingly, the record evidence showed that the NVOCC had prior incidents of using the scheme to offer one rate and then claim that – due to the cargo classification issue and the "Filed-Rate Doctrine" – the NVOCC was required to collect a higher rate. In essence, the NVOCC was operating a maritime "bait and switch" operation. The ALJ ignored the opportunity to bring the *Total Fitness Equipment* case within the proper *Intercoastal Investigation/Altieri/Stockton Elevators/ European Trade/Deringer* line of Commission precedent.

Then in *Abubakar Kamara and Abdulai Kamara v. Honesty Shipping Service and Atlantic Ocean Line*, 29 SRR 321, 322 (FMC 2001), a different Commission ALJ took the opposite course and returned to traditional case precedent as to what constitutes a "practice" in dismissing a complaint alleging a violation of section 10(d)(1):

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[64] *See Kobel*, 32 SRR at 1759.

[65] The "Filed-Rate Doctrine" provides that any entity required to file tariffs governing the rates, terms, and conditions of service must adhere strictly to those terms.

> It is not clear that a carrier's simple failure to remit payment to a subcontracting carrier constitutes a Shipping Act violation, although the shipper would certainly have a commercial contractual claim. A series of cases alleging Section 10(d)(1) violations has established that a complainant must demonstrate regulations and practices , as opposed to identifying what might be an isolated error or understandable misfortune. See, for example Informal Docket No. 1745(I), *Mrs. Susanne Brunner v. OMS Moving Inc.*, slip decision served January 27, 1994, administratively final March 8, 1994. In the present case, however, despite the Settlement Officer's request, the complainants failed to either cite a specific statutory violation or attempt to describe a relevant pattern of behavior.")

Id. at 322 N 8 (emphasis added).

Last in line and leading up to *Houben v. World Moving Services, Inc.*, 31 SRR 1401 (FMC 2010), is the Commission's decision in *William Brewer, William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc.*, 29 S.R.R. 6 (FMC 2000). In its *Kobel* Remand Order, 32 SRR 1720 (FMC 2013), the majority cited *Brewer* as follows:

> The Commission has found that a failure to observe and enforce just and reasonable practices is a violation of section 10(d)(1), regardless of whether it involves a single shipment or multiple shipments. See . . . *William Brewer* (cite omitted) (NVOCC held to have violated section 10(d)(1) with respect to a single shipment when it refused to release cargo at the destination port unless additional money was paid, and instructed its agents to place the shipment on hold).

Id. at 1731-1732.

As discussed at some length in the *Kobel* Remand Order, the dissent listed the full chronical of Mr. Bustani's misdeeds as an

NVOCC.[66] One year prior to Mr. Brewer's proceeding and based on numerous complaints, the Commission had ordered a formal investigatory proceeding into Mr. Bustani's activities. When the ALJ discussed application of law to the facts of that case, he relied on *Total Fitness Equipment d/b/a/ Professional Gym v. Worldlink Logistics, Inc.*, 28 SRR 45 (ID 1997), aff'd. 28 SRR 534 (FMC 1998), and most pointedly on the recent Commission Investigation as follows:

> This is a type of "bait and switch" tactic that the Commission has recently encountered in the case of *Total Fitness*. [internal footnote: In another case involving an ethically deficient NVOCC who had engaged in the "bait and switch" tactic, the Commission observed that a persistent pattern of quoting rates and failing to file them could constitute a violation of section 10(b)(6) of the Act (now 10(b)(4)(A)) which forbids carriers from engaging in unfair practices in the matter of rates.] . . . Respondents' conduct is even more deplorable in the instant case because they have been the subject of a formal Commission investigation as well as many informal complaints, ultimately being penalized some $100,000 and ordered to cease and desist from committing violations of the Act. By such conduct respondents can now take their place alongside ethically deficient NVOCCs who have mishandled shipments, improperly demanded more money, blamed their agents, or even held shipments "hostage" in order to extract more money from the shippers who were trying to obtain release of their cargo.

Id. at 1334 (cites omitted)(emphasis added).

Three issues are clearly presented by the *William Brewer* case. First, the ALJ relies on the "Normal, Customary, & Continuous" business practices of Mr. Bustani, as found in the then quite recent Commission investigation, as support for his ruling. In

[66] *See Kobel*, 32 SRR at 1759-1760.

fact, the entire context of Mr. Bustani's activities would be a proper "poster child" for section 10(d)(1) cases.

Second, the *William Brewer* case does not lend support to the majority's position that a single incident, standing alone, meets the requirements of section 10(d)(1). To the contrary, when read in its full context, it supports the minority position.

Third, is the illuminating footnote in *Brewer* where the ALJ acknowledges the 1984 Act's requirement that the term "practices" means, in his words, a "persistent pattern" of complained of improper activity.[67] As noted above in the discussion of the Presumption of Consistent Usage, it is not possible to reconcile a definition of "practice" within section 10(b)(4) as meaning a "persistent pattern", with a definition of "practice" within section 10(d)(1) as meaning – take one's pick, any single industry practice, any single unjust practice, or any single customer problem with their international shipment.

Last is the case of *Houben v. World Moving Services, Inc.*, 31 SRR 1400 (FMC 2010), where in 2010, the Commission came out into the sunlight and held that a single shipment is within the purview of section 10(d)(1) of the 1984 Act. The facts involved a single shipment of household goods from the U.S. to Belgium. In an informal (small claims) proceeding and a *pro se* complainant, the settlement officer had amended the complaint *sua sponte* to incorporate a section 10(d)(1) allegation. The case was presented to the Commission on an expedited *de novo* review basis. The Commission cited *Adair, Symington, European Trade Specialists, Tractors and Farmers,* and *Maritime Services* as precedent for their

[67] *Brewer*, 28 SRR at 1334. n. 4 ("In another case involving an ethically deficient NVOCC who and engaged in the "bait and switch" tactic, the Commission observed that a *persistent pattern* of quoting rates and failing to file them could constitute a violation of 10(b)(6) of the Act (now sec. 10(b)(4)(A)), which forbids carriers from engaging in unfair *practices* in the matter of rates. See *Martyn Merritt – Possible Violations of Shipping Act of 1984*. 25 SRR 1495, 1500 (1991)." (emphasis added).

holding that the freight forwarder had violated section 10(d)(1). Of interest, as discussed above, *European Trade Specialists* stands in complete contradiction to the *Houben* decision and, in *Maritime Services*, the full Commission expressly dismissed all claims under Section 17 claims, the predecessor provision to section 10(d)(1) of the 1984 Act.

Thus, the majority holds out as the precedent foundation for its current position on what constitutes a violation of section 10(10(1) a line of Commission cases, beginning with an informal small claims proceeding concerning the shipment of a single motorcycle in *Adair*, a single shipment of tires in *Tractors and Farmers*, and the shipment of a single automobile in *Symington*. The majority dismisses or ignores the line of Commission cases in *Intercoastal Investigation, Altieri, Stockton Elevators, European Trade Specialists, Deringer, and Kamara* offering precedent as to what constitutes a "practice" under the Shipping Act. The legal rules concerning federal agency *stare decisis* is discussed below.

D. Structure and Statutory Scheme

In *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), the D.C. Circuit Court directs us to consider and examine the broader statutory framework in interpreting a statute.[68] The *Loving* court then noted that Congress had enacted numerous other provisions and revisions over many years concerning the tax preparation business. "Under the IRS's view here, however, all of Congress's statutory amendments would have been unnecessary."[69] With the IRS's new and expansive interpretation of its agency's century old statutory language, "[t]hat would have already covered all (or virtually all) of the conduct that Congress later spent so much time specifically

[68] *Loving* at 1020 ("Fourth is the broader statutory framework. 'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. . See *Roberts v. Sea-Land Services, Inc.*, __ U.S. __, 132 S.Ct. 1350, 1357, 182 L.Ed.2d 341 (2012)(internal quotation marks omitted). *Id.* at 1020.

[69] *Loving*, 742 F.3d at 1020.

targeting in individual statutes regulating tax-return preparers."[70] The court concluded its discussion on this section of the decision, with, "As the Supreme Court has stated, 'the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.' *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L.Ed.2d 121 (2000)."[71]

The reasoning and holding of the *Loving* court is, again, directly on point. If, as the majority holds here with respect to Hapag, section 10(d)(1) of the 1984 Shipping Act applies to each single incident of cargo delay, damage, or related breach in performance of the regulated entity's duties concerning receipt, handling, storage, and delivery of property, then why did Congress even bother to enact COGSA in 1936 with its carefully crafted and balanced regime of limited common carrier defenses on one hand and limited common carrier liability on the other?[72]

In the recent *Bimsha International v. Chief Cargo Services*, 32 SRR 1861 (FMC 2013), the Commission ignored a highly specific federal statute covering the proper handling of negotiable bills of lading in maritime commerce. In that case, concerning a cargo move from Pakistan to the United States, an ocean transportation intermediary erroneously and improperly delivered the negotiable bills of lading on three containers involved in a single transaction to the U.S. buyer without first receiving payment.

The Federal Bills of Lading Act (the "Pomerene Act")[73] sets forth five specific cargo origin and delivery destination possibilities (intra-state, inter-state and foreign destination).[74] The single origin-destination pair that is omitted from coverage under the act is a foreign origin of shipment and U.S. delivery destination. Hornbook

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[70] *Id.*
[71] *Id.* at 1020-1021.
[72] *See* Note ___, supra.
[73] Federal Bill of Lading Act, 49 U.S.C §§80101 – 80116.
[74] 49 U.S.C §§80102.

law explains, "[s]ince the Pomerene Act does not apply to bills of lading issued in foreign countries for shipments to the United States, the negotiability of such bills would depend on the law of the country of issue."[75] The Commission did not consider Pakistani law, but simply "filled the gap" that Congress must have inadvertently left, reasoning that misdelivery of any negotiable bill of lading was "unjust and unreasonable".

Given the specificity of Congress's consideration of all various origin-destination shipment possibilities in the Pomerene Act enacted the same year as the Shipping Act of 1916, the Negative-Implication Canon is directly applicable in this context. Consider the following commentary:

> [I]f Parliament in legislating speaks only of specific things and specific situations, it is a legitimate inference that the particulars exhaust the legislative will. The particular which is omitted from the particulars mentioned is the *casus omissus*, which the judge cannot supply because that would amount to legislation.

J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. Toronto L.J. 286, 298 (1936). As Justice Brandeis noted in *Ebert v. Poston*, 266 U.S. 548 (1925), "A *casus omissus* does not justify judicial legislation." *Id*. at 554.

I submit that where it is improper for a court to supply an omitted particular lest it engage in "judicial legislation", it is equally, if not more, improper for a federal regulatory agency to supply an omitted particular into a statute, especially so when considering a statute that Congress has not assigned to such agency for administration.

Further undeterred, the Commission asserted that its subject matter jurisdiction extended to all matters expressly covered by the

[75] Grant Gilmore and Charles L. Black, *The Law of Admiralty* 95 (2d ed. 1975).

Pomerene Act.

> Even if the Pomerene Act applied, "[w]hen there are two [federal] acts upon the same subject, the rule is to give effect to both if possible," unless there is "positive repugnancy" between them. *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939). There is no conflict between the Shipping Act and the Bills of Lading Act. And if there were, the Shipping Act is the later enacted statute and would control.[76]

Brief of the Respondents, Federal Maritime Commission and United States of America, *Chief Cargo Services Inc. v. FMC and USA*, 11 (2 Cir. 2014)(no.13-4256AG).

So the Commission has asserted that the Shipping Act has extraterritorial application, in contradiction of the presumption that a statute has no extraterritorial application.[77] More implausibly, the Commission would have the maritime regulated community and the public at large believe that on Tuesday, August 29, 1916 Congress enacted the detailed and specific provisions of the Federal Bills of Lading Act, and then, on the following Thursday, September 7, 1916 – *just nine days later* – Congress enacted the Shipping Act and that Congress intended for the Shipping Act to both (i) apply to the same maritime issues as the Pomerene Act, and (ii) be the controlling statute in such identical fact situations concerning negotiable bills of lading, due to its more recent birth date.

Never considered by the Commission is the far more logical and probable Congressional intention that the new Shipping Act apply to a different spectrum of maritime problems and abuses, say, for example, a regulated maritime entity that exhibited a "Normal,

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[76] The Shipping Act, 1916, 39 Stat. 728, was enacted on Sept. 7, 1916, a mere week after the Bills of Lading Act, Aug. 29, 1916, 39 Stat. 545.

[77] See *Black's Law Dictionary* 1874 (9th ed. 2009)("Statutes are confined to their own territory and have no extraterritorial effect.") *See also Sandberg v. McDonald*, 248 U.S. 185 (1918)("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.") *Id.* at 195.

Customary, and Continuous" - i.e. the normal, customary, often repeated, systematic, uniform, habitual and continuous - *practice* of misdelivering negotiable bills of lading without first receiving payment from the consignee/purchaser of the cargo. The Pomerene Act has a set process for civil penalties. The Shipping Act has processes for ordering reparations, and for ordering civil penalties, and for ordering the revocation of the regulated entity's FMC license and operating certificate, and for ordering a cease and desist order, enforceable in federal court, and for the award of attorney fees. With different statutory purposes, the Shipping Act and the Pomerene Act operate at two totally different levels.

The broader statutory framework of The Shipping Act maintains a constant compass setting that directs us towards the current minority position as set forth above,all reflecting the clear intent of Congress and articulated in *Intercoastal Investigation, Altieri, Stockton Elevators, European Trade,* and *Deringer*.

A final argument that falls within statutory structure, statutory scheme and Whole-Text Canon analysis is consideration of the clear Congressional expression of the context and relative place that the Shipping Act occupies in maritime legislation and jurisprudence as set forth in Section 16 of the 1984 Act. To once again reference the deregulatory legislative intent of the 1984 Act, Congress gave the Commission the statutory right to grant exemptions from requirements of the 1984 Act upon certain findings. The 1984 version of Section 16,in relevant part, provides:

> **Section 16. Exemptions**
> The Commission, upon application or on its own motion, may by order or rule exempt for the future . . . any specified activity of [persons subject to this Act] if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce.

46 U.S.C. § 40103.

This Section 16 exemption authority was enhanced and further liberalized in the 1998 amendments to the Shipping Act of 1984. Congress eliminated two of the four findings that the Commission was required to make prior to granting any exemption from regulation: that the exemption would substantially impair effective regulation by the Commission or be unjustly discriminatory. Following enactment of the Ocean Shipping Reform Act of 1998, the Commission need only find that an exemption would not result in substantial reduction in competition or be detrimental to commerce.

Thus, the Congressional intent, overall context and statutory mandate of the 1984 Shipping Act together with the 1998 changes to the Commission's § 16 exemption authority, makes clear that Congress wanted the Commission to focus its regulatory authority on maritime activities that: i) result in substantial reduction in competition, and ii) are detrimental to commerce.

With the 1998 amendments, Congress injected additional competitive market-driven provisions into the Shipping Act of 1984. Several provisions were expanded, including new provisions that retreated from traditional common carriage concepts; for example, vessel operators were newly allowed to enter into private confidential contracts with shippers. A shipper's competitors and other shipping lines were no longer allowed to see the commercial terms of such contracts and were no longer allowed to claim "me too" status and demand equal commercial terms. In short, Congress wanted more reliance on competition, less reliance on regulation.[78]

The Whole-Text Canon, as discussed above, is the cornerstone of canons of statutory interpretation when one is seeking context and legislative intent and has been long observed in

[78] In the Ocean Shipping Reform Act of 1998, Congress added a new element to the 1984 Act's statutory policy. 46 U.S.C. § 40101 ("Section 2. Declaration of policy. The purposes of this Act are - . . . (4) to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.")

the law. Sir Edward Cook explained this canon over three hundred and eighty years ago:

> [I]t is the most natural and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the maker. . . If any section [of the law] be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other.[79]

In a more contemporary comment, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), the U.S. Supreme Court expressed the Whole-Text Canon as follows:

> In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.

Id. at 291.

We must align and juxtapose Section 10(d)(1) with Section 16 and then consider the question:

> (i) did Congress enact Section 10(d)(1) with the intent to bring federal agency oversight and regulation to common carrier entities who abuse the maritime shipping public by imposing unjust and unreasonable business methods, and who do so on a normal, customary, and continuous basis, and thereby negatively impact maritime transportation competition or inflict detrimental effect upon the commerce of the United States;

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[79] Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* section 728, at 381a (1628, 14th ed. 1791).

OR

(ii) did Congress enact Section 10(d)(1) with the intent to bring regulation to a ship owner, such as Hapag in the case *sub judice*, who places a single damaged container in a "hold" status, but then makes a clerical error and loads such single container on a sea voyage; and, bring federal agency oversight and regulation to an ocean transportation intermediary who – being frustrated by a customer who continues to refuse commercially reasonable and lawful demands for payment over several months – then decides to liquidate the customer's cargo at a single auction that allegedly did not meet Oregon state Uniform Commercial Code provisions?[80]

I find that the answer is clearly the first, and most decidedly not the later.

VII. New Commission Arguments

The Commission has constructed within this *Kobel* proceeding an argument that has never surfaced in the full one-hundred years since Congress first enacted the now familiar phrase,

[80] The majority is less than clever – or persuasive – where it attempts to position itself on both sides of the divide by claiming that the respondents in the case *sub judice* were engaged in three separate transactions. See the majority opinion; "Each bill of lading represents a separate contract of carriage and document of title. Therefore, Complainants' claim involves three separate transactions. . . . . [I]n any event, Complainants' claim involves three separate transactions." This case involves a single group of claimants, a single freight forwarder, a single NVOCC, and a single ship operator. The five containers were all part of a contemporaneous business arrangement when the claimant contacted the freight forwarder. There was a single auction by respondents of the claimant's cargo. There are no allegations in the complaint, no allegations in the record, and most importantly, not a single fact in the record to support such a hollow argument that three containers at a single auction qualifies as a "practice" that is proscribed by Section 10(d)(1) of the 1984 Act.

"establish, observe, and enforce just and reasonable regulations and practices . . ." in the 1910 Mann-Elkins Act amendments to the ICA. The Commission's argument and construction of the statute found in the Remand Order in this case, *Kobel*, 32 SRR1729-1731, defies any reasoned summation. After numerous readings, I cannot determine whether the Commission's construction is circular reasoning – restating the premise as the conclusion – or if it is more properly characterized as either a rhetorical tautology or a logical tautology.

In an effort to pry apart the Commission's dense seven page construction,[81] first consider their attempt to dismember the initial phrase, "establish, observe, and enforce" and then to utilize the canon of construction that holds, if possible, every word of a statute is to be given effect.[82] The majority argument begins with the clever creation of a claimed absurdity and then artificially buttresses the claim with a naked finding that Congress really intended to use the disjunctive "or" rather than the conjunctive "and" in the phrase. Once disjoined, the majority asserts that each, now separate element, must have its separate application so as to avoid application of the Surplusage Canon.

> [I]t would be a violation of the section only when a complainant can demonstrate that a respondent simultaneously committed all [of] the three elements of the section. If a respondent established just and reasonable regulations and practices, it would not violate section 10(d)(1) even if that respondent failed to observe or enforce the established just and reasonable regulations and practices. Under this scenario, a violation cannot occur because the respondent established a just and reasonable regulation and

[81] See *Kobel*, 32 SRR 1728-1735.

[82] In the *Kobel* Remand Order, 32 SRR 1720 (FMC 2013), the majority states that, "[t]he Commission must 'give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.' *Inhabitants of Montclair Tp. V. Ramsdell*, 107 U.S. 147, 152 (1883). *Id.* at 1729.

> practice and thus the complainant would never satisfy the first of the three elements of the section. This reasoning, however, contains a fatal flaw in that it completely disregards the language "observe and enforce" in section 10(d)(1).

Kobel, 32 SRR at 1729.

The majority then adds a gloss of the Absurdity Canon and the Plain Meaning Canon where it holds:

> Even the failure in a single transaction can be a failure to observe and enforce a just and reasonable regulation and practice, and therefore, a violation of section 10(d)(1). This interpretation gives effect to every word of section 10(d)(1) and avoids the construction that "the legislature was ignorant of the meaning of the language it employed." This interpretation also avoids the irrational incentive for regulated parties to establish just and reasonable regulations and practices, but not to observe and enforce them, which the Commission believes would be in complete derogation of the plain language of section 10(d)(1).

Id. at 1730.

To begin a logical process of unscrambling the majority's argument, I would first reflect back to *Bell Atlantic Telephone v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), discussed above in the Framework for Analysis: "[T]extual analysis is a language game played on a field known as 'context.'' *Id.* at 1047 (emphasis added).

The majority's "language game" of conjunctives versus disjunctives and "irrational incentives" ignores three issues that, individually and collectively, point us towards an opposite compass course.

First, the context of transportation statutes and regulations over a full century of analysis, litigation, and application by the ICC, the FMC and its predecessor agencies, and all reviewing federal courts have never witnessed the dissection and dismemberment of the phrase, "establish, observe, and enforce" in any manner that remotely resembles the majority position. Second, the majority refuses to acknowledge the simple and most logical response to their "irrational incentive" argument – namely, if a regulated entity "established" a just and reasonable "practice" but then proceeded to act in an opposite manner - i.e. an unjust or unreasonable manner - and did so on a Normal, Customary, and Continuous basis, then the regulated entity clearly never "established" anything in the first place. Thus the contrived disharmony disappears.

In discussing the Surplusage Canon, Justice Antonin Scalia addressed limitations on the canon's use that are most relevant in the current analysis.

> [a] court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage. So like other canons, this one must be applied with judgment and discretion, and with a careful regard to context. . . Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach. Doublets and triplets abound in legalese: *Execute and perform* – what satisfies one but not the other.

See Scalia and Garner, *supra*, at 176-77 (emphasis in original).

In their attempt to employ the Surplusage Canon of statutory construction, the majority fails to give <u>any</u> regard to the history of the liner shipping business, the legislative history, or the judicial history – all of which provides context for the "triplet" phrase "establish, observe, and enforce". If the "triplet" that Justice Scalia acknowledges as "legalese" is given a common sense construction

that has survived since 1910 without question or assault, then the majority's position collapses.

Next, the majority invokes the Surplusage Canon in such a manner that tortures out a uniquely new interpretation[83] of section 10(d)(1) of the 84 Act. But what the majority refuses to either recognize or acknowledge is the clear fact that their construction not only ignores, but actively throws overboard, a far more fundamental term in the statute – namely the term "practice" as used by Congress and recognized by the ICA, the Commission and its predecessor agencies, and federal courts since 1910. Thus the majority's usage and construction fundamentally violates the Surplusage Canon.

The majority attempts to incorporate a different place for the term "practice" to reside within the section where they offer the following as framework and their version of "context":

> We note that the relevant framework in analyzing the Commission's jurisprudence is common carriage. In a common carriage context, a common carrier, MTO, or OTI provides services to the general public. When analyzing whether a common carrier's, MTO's, or OTI's regulations and practices are just and reasonable, it is relevant to consider the usual course of conduct of the common carrier, MTO, or OTI and also the course of conduct of other common carriers, MTOs, or OTIs under similar circumstances.

Kobel, 32 SRR at 1730.

This majority argument may pass inspection for addressing whether a given regulation or practice is "just and reasonable." But the majority's point is an answer to a separate and unasked question

[83] In debates on current world events, the discussion of "enhanced interrogation techniques" (EIT) seems apropos concerning the majority's interpretation of the phrase "establish, observe, and enforce" – namely, if one employs sufficient EITs, the words will eventually say anything you want them to say.

that is not relevant to the case *sub judice*. All vessel operators follow a "practice" to not load damaged containers onto their ships. Hapag followed that common sense industry practice. It is a "just and reasonable" practice. However, the *relevant* question is – did Hapag engage in a Normal, Customary, & Continuous *practice* of loading damaged containers onto their ships. Whether Hapag was engaging in such activity on a knowing and intentional basis, by lack of training for the clerk, or ordinary negligence is not legally or logically relevant.[84]

Likewise, accepting the premise for the sole purpose of this argument that the Oregon Uniform Commercial Code provisions concerning proper procedures for liquidating and selling at public auction the cargo that a shipper has (i) entrusted to a business fiduciary, such as a warehouse, freight forwarder, or common carrier, and (ii) and the shipper has failed to make proper payment for related charges, sets forth the "just and reasonable" practices that such fiduciaries should follow – the same fundamental question is an integral and essential element in a section10(d)(1) case. Is it the freight forwarder's or common carrier's Normal, Customary, & Continuous practice to violate, circumvent, or ignore such "just and reasonable" practice; all as established by allegations in the complaint and by offer of credible record evidence? One case is judiciable before a state or federal court of general jurisdiction and the other is a matter that could implicate the Shipping Act and the Commission.

VIII. Beyond *Chevron* "Step One" – Two Arguments

The above sections have focused on the legal analysis required under *Chevron* "Step One" and the process of finding the intent of Congress. Upon finding Congress's intent, then that is the end of the matter and we do not move over into *Chevron* "Step Two" where deference to the agency's discretion as regards filling in

[84] Thus, the majority's citation and reliance on *Volkswagen*, 390 U.S. 261 (1968), is inapt.

legislative gaps and holes has been ruled as appropriate, subject to some limitations. However, two further matters remain and need discussion.

A. The majority has built an impressive string of cases over the last four years since *Houben*, 31 SRR 1400 (FMC 2010). The case *sub judice* is the first proceeding where the *bona fides* of the majority position – *i.e*. a single failure to observe a duty is a violation of section 10(d)(1) – has been examined and challenged. Accordingly, a sub textual refrain emerges whereby this new line of cases is now the foundation and supporting precedent for the majority position.

I addressed this issue in *Bimsha*, 32 SRR 1861 (FMC 2013), with reference to a prior situation where the Commission was admonished by the U.S. Supreme Court for regulatory overreach when it spread its jurisdictional net beyond the three-mile limit of the 1916 Act and over a far wider ocean. In *FMC v. Seatrain Lines, Inc*., 411 U.S. 726 (1973), the Commission was challenged over its interpretation and application of Section 15 of the 1916 Act. The Commission had, for a number of years, interpreted the general wording of the section that required vessel common carriers to file joint operating and conference agreements at the Commission and obtain prior approval, to include authority to approve or disapprove proposed acquisitions and mergers of an ocean common carrier by another ocean common carrier. The Commission pointed to the Civil Aeronautics Board (CAB) and their statute which contained similar wording. The U.S. Supreme Court noted that Congress had enacted a separate and specific provision for airline mergers in a different section of the CAB statute, and held as follows:

> [s]pecific grants of airline merger approval authority [were included in 49 U.S.C. Section 1378(a)(1)].[The Court was thus] . . . unwilling to construe the ambiguous provisions of Section 15 to serve this purpose, a purpose for which it is obviously not intended. As the Court of Appeals found, the House Committee which wrote Section 15 "neither sought information nor had discussion on ship sale agreements.

> They were neither part of the problem nor part of the solution." [cite omitted] If . . . there is now a compelling need to fill the gap in the Commission's regulatory authority, the need should be met in Congress where the competing policy questions can be thrashed out and a resolution found. We are not ready to meet that need by rewriting the statute and legislative history ourselves.

Id at 744, 745.

The Commission then further argued that proposed ocean common carrier merger and acquisition agreements had been filed with and ruled on by the Commission for a number of years. The Supreme Court addressed the Commission's rejoinder argument as follows:

> But the Commission contends that, since it is charged with the administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. [cite omitted]. This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.

Id at 745 (emphasis added).

In *Pittsburg Press Company v. NLRB*, 977 F. 2d 652 (D.C. Cir. 1992), the Court of Appeals for the District of Columbia Circuit considered a federal agency's argument that its current decision was following recent agency precedent and ruled as follows:

> We do not think it enough to say that this latest decision is consistent with the general drift of NLRB precedent, as it is that very drift that troubles us . . . [t]he Board has seemed willing to go with the flow, offering no reasoned justification for its course.

Id. at 660-61.

The Commission's steady course change in its interpretation of section 10(d)(1) of the 1984 Act does not gain added degrees of correctness with each re-affirming decision as described in the opening section of this dissent. As with *Seatrain Lines*, the Commission cannot bootstrap itself into a new, broadly expanded section 10(d)(1) scope where the agency has no statutory grant of Congressional authority in the first place.

B. The D.C. Circuit's *Loving* decision, 742 F.3d 1013 (D.C. Cir. 2014), acknowledges a federal agency's right to change its collective mind and adopt a new or different interpretation of a statute. The Court then points out a fundamental logical flaw in the IRS's new statutory interpretation as follows:

> The IRS is surely free to change (or refine) its interpretation of a statute it administers. [cite omitted] But the interpretation, whether old or new, must be consistent with the statute. And in the circumstances of this case, we find it rather telling that the IRS had never before maintained that it possessed this authority. [cite omitted] In light of the text, history, structure and context of the statute, it becomes apparent that the IRS never before adopted its current interpretation for a reason. It is incorrect.

Id at 1021.

The proposition that a federal agency is "free to change its interpretation" of a statute is further governed and constrained by a judicial rule of considerable importance – the rule of federal agency *stare decisis*. The U.S. Supreme Court held in *Motor Vehicle Mfrs. Ass'n v. State Farm Insurance*, 463 U.S. 29 (1983), "[a]n agency changing its course . . . is obligated to supply a reasoned analysis for the change. . ." *Id*. at 42.

The full application of *stare decisis* in Commission proceedings was recognized in *Harrington & Co and Palmetto Shipping & Stevedore v. Georgia Port Authority*, 23 SRR 753 (ID

1986):

> . . . a close look at the cases and authorities reveals that administrative agencies follow the doctrine of *stare decisis* in much the same way as do courts. Just as the courts change their minds from time to time, so do the agencies . . . the courts do not bind themselves forever to decisions which experience teaches them to have been wrong and to work harm under present conditions. However, the decision to depart from precedent is not taken lightly and *requires compelling reasons* . . . Although agencies are given some leeway in changing their minds in light of experience and changing conditions, the courts are emphatic in requiring agencies to follow their precedents or *explain with good reason* why they choose not to do so, All the circuits impose this requirement.

Id. at 766 (emphasis added).

Numerous federal courts of appeal have addressed the issue of administrative agency *stare decisis.* The District of Columbia Circuit held in *Jicarilla Apache Nation v. U.S. Dept. of Interior, et al.* 613 F. 3d 1112 (D.C. Cir 2010), and citing *State Farm Insurance* [85] as follows:

> We have held that "[r]easoned decisionmaking . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent," and an agency that neglects to do so acts arbitrarily and capriciously. [cites omitted] [w]e have never approved an agency's decision to completely ignore relevant precedent. [cite omitted] Thus, "[a]n agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.

Id. at 1119-20 (cites omitted).

[85] *State Farm Insurance*, 463 U.S. 29 (1983).

The District of Columbia Circuit gave a full and pointed explanation concerning the requirements and reasons for an independent agency to either follow its own precedent or explain any change with full justification in *Baltimore and Annapolis Railroad v. Washington Metropolitan Area Transit Commission*, 642 F. 2d 1365 (D.C. Cir. 1980) as follows:

> The [WMAT] Commission cannot replace its conclusion that it lacks jurisdiction [over transportation services], with a different view, unless the announcement of that different view is accompanied by an explanation of the Commission's reasons for making the change. Furthermore, the reasons contained in the explanation must be consistent with law and supported by substantial evidence on the record. Even absent special circumstances, it is vital that an agency justify a departure from its prior determinations.
>
> First, the requirement of reasons imposes a measure of discipline on the agency, discouraging arbitrary and capricious actions by demanding a rational and considered discussion of the need for a new agency standard. The process of providing a rationale that can withstand public and judicial scrutiny compels the agency to take rule changes seriously. The agency will be less likely to make changes that are not supported by the relevant law and facts.
>
> Second, the requirement of reasons fulfils the duty of fairness and justice owed by the agency to the party or parties "victimized" by the agency's decision to shift course . . . a "disappointed party, whether he plans further proceedings or not, deserves to have the satisfaction of knowing why he lost his case." [cite omitted]
>
> Third, and perhaps most important of all, the requirement of reasons facilitates judicial review. "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." [cite omitted]
>
> The burden of justifying an agency's decision that contradicts one of its prior decisions, properly belongs to the

agency itself and not the courts. [cite omitted]

Id. at 1370.

Other relevant federal circuit decisions concerning *stare decisis* and the rule forbidding arbitrary and capricious agency decision making include *RKO General v. FCC*, 670 F. 2d 215, 223 (D.C. Cir 1981):"Failure to explain the reversal of directly controlling precedent is unlawful. *Id.* at 223 (cite omitted)(emphasis added). Also see *Federal Trade Commission v. Crowther*, 430 F. 2d 510 (D.C. Cir 1970): "[I]t is not enough to explain the Commission's changed feeling by merely asserting that it has struck a new balance. Rationality in administrative adjudication requires something more than that." *Id.* at 516.

The majority's treatment of Commission precedent was addressed in Section VI C, Legislative and Judicial History, *supra*. That decisional language bears repetition for this discussion of federal agency *stare decisis*. The majority held in the *Kobel* Remand Order:

> *Stockton Elevators* was not a case that discussed whether the respondent's regulations and practices in question were "unjust or unreasonable," but whether five specific instances of transactions violated section 17 of the Shipping Act, 1916. The presiding officer[86] held that considering the justifiable reason (alleviating the grain elevator congestion), the six instances of deviation from the established regulations and practices were not violations of the section. *Stockton Elevators* discussed section 17 (and section 16) of the Shipping Act of, 1916, language which is different from section 10(d)(1) of the Shipping Act of 1984. . . [s]ection 17 of the Shipping Act, 1916 stated, "[w]henever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe and order enforced

[86] The *Stockton Elevators* investigation report was issued by the full Commission.

> a just and reasonable regulation or practice." Id at 196. That language, however, was later removed from the legislation of the Shipping Act of 1984, and section 10(d)(1) does not contain it. [cite omitted] Therefore, although *Stockton Elevators* discussed the predecessor to section 10(d)(1), it did not discuss the same statutory language in the same context as section 10(d)(1) and thus is not directly precedential in the analysis of section 10(d)(1).

Kobel, 32 SRR at 1732.[87]

In its Remand Order, the majority then dismisses another Commission controlling precedent, *Altieri*, 7 F.M.C. 416 (Examiner 1962), with an even lighter flip of the wrist in a footnote: "Respondent Hapag-Lloyd also discussed *Altieri* [cite omitted] which later became the decision of the Commission. As *Stockton Elevators, Altieri* discussed section 17 of the Shipping Act, 1916, and thus is not precedential in section 10(d)(1) analysis." *Kobel*, 32 SRR at 1732, n. 14.

Last, the majority takes on the Commission's controlling precedent, *European Trade Specialists*, 19 SRR 59 (FMC 1979), and directly quotes that decision's language and reasoning at length, including a key holding, where the majority states, "The Commission affirmed the [*European Trade Specialists*] ALJ's decision because the respondent's conduct was not 'a normal

[87] The majority omits significant relevant language from the *Stockton Elevators* investigation report, *Investigation of Certain Practices of Stockton Elevators*, 3 SRR 605 (FMC 1964): "It cannot be found that the Elevator engaged in a "practice" within the meaning of Section 17. The essence of a practice is uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct. It is not an occasional transaction such as here shown. [citing *Intercoastal Investigations*, *Whitman*, and *Wells Lamont*] . . . [e]ven if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred. . . Regardless of other legal points raised, there has been no showing that either respondent participated in any act which was unjust, unfair, or unreasonable." *Id.* at 618 (emphasis added).

practice.'", 32 SRR at 1733. The majority then leaps all chasms of logic and states:

> As *Stockton Elevators* discussed above, *European Trade Specialists* discussed section 17 of the Shipping Act, 1916, which gave the predecessor to the Commission[88] an authority to "determine, prescribe, and order enforced a just and reasonable regulation or practice," whenever it finds any regulation or practice unjust or unreasonable. Therefore, *European Trade Specialist* also discussed different statutory section with different context and is not directly precedential in the analysis of section 10(d)(1).

Kobel, 32 SRR at 1733 (emphasis added).

As previously discussed and exposed, the sentence that Congress omitted in 1984 when it revised the 1916 Act had nothing to do with the matters consider by the Commission in the *Stockton Elevators* investigation report. Also as demonstrated above, the wording of section 10(d)(1) of the 1984 Act and Section 17, second paragraph, Part A – first sentence of the 1916 Act is so close to identical mirror image that any argument asserting the prior Commission case law "discussed statutory section with different context and is not directly precedential in the analysis of section 10(d)(1)" is vacuous and unsupported other than the *ipse dixit* of the majority.

The Commission has consistently refused to address or even acknowledge the fact that the Commission ALJ's decisions in *Adair/Tractors/Symington* began the tidal change that implicitly overruled prior and well established Commission precedent

[88] The majority is in error. The current Commission descended from the Federal Maritime Board by Congressional act in 1961 and has continued in its current status to this date. The *Altieri* case was decided in October, 1962, the *Stockton Elevators* investigation report was considered and approved by the full Commission in June, 1964, and the *European Trade Specialists* case was decided by the full Commission in March, 1979.

including full Commission decisions, a comprehensive Commission Order of Investigation Report,[89] and corresponding federal court decisions applying companion ICA statutory provisions. Recall that *Houben* was a small claims matter with a *pro se* claimant handled by a Settlement Officer. Commission staff initiated an expedited *de novo* review by the full Commission. There were no legal briefs prepared by either party as both were not represented by counsel. That is the *Houben* record. The Commission's *Houben*[90] decision in 2010 was the first to put the new rule that a single incident was all that was needed to find a violation of 10(d)(1) in clear focus for the regulated maritime community to see, consider, and digest.

The closest that the Commission has come to acknowledging any change from prior established Commission jurisprudence is found in a brief comment in the *Bimsha* matter. See the ALJ's Initial Decision in *Bimsha*, 32 SRR 353 (ID 2011), where he is placing substantial reliance on the *Houben* decision's construction of section 10(d)(1). His decisional reasoning is as follows:

> *European Trade Specialists v. Prudential Grace Lines*, decided under section 17 of the Shipping Act, 1916, is problematic. . . To the extent there is a conflict between *Houben* and *European Trade Specialists*, I follow *Houben*, the more recent case.

Id. at 378 (cites omitted)(emphasis added).

Such is the full record of the Commission's "reasoned analysis",[91] "compelling reasons",[92] and "substantial evidence on the record"[93] that supports the change in navigation course – a full

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[89] *Stockton Elevators*, 3 SRR 605 (FMC 1964).
[90] *Houben*, 31 SRR 1400 (FMC 2010).
[91] See *State Farm Insurance*, 463 U.S. 29 (1983).
[92] See *Harrington & Co and Palmetto Shipping & Stevedore v. Georgia Port Authority*, 23 SRR 753 (ID 1986).
[93] See *Baltimore and Annapolis Railroad v. Washington Metropolitan Area Transit Commission, 642 F. 2d 1365 (D.C. Cir. 1980)*

180 degree course change – from the long held, affirmed, and reaffirmed position on what elements were necessary to establish a section 10(d)(1) violation. From 1910 through 1991, we had a fully consistent application of the law. In 1991, a Commission ALJ began a course change. In 2001, a different ALJ tried to bring the ship back into the navigation channel. Then, in 2010, through a pro se small claims matter, the Commissioner threw the rudder hard over to effectuate a radical departure from the historical and traditional jurisprudence. We have gone from:

> 1. A Section 17, second paragraph / section 10(d)(1) violation is established upon presentation by the claimant of credible record evidence that (i) respondent is a regulated entity; (ii) respondent engaged in an act, an activity, or, by way of omission, failed to act in a maritime context concerning the receipt, handling, storage, or delivery of property in international waterborne commerce; (iii) such act, activity, or omission was the Normal, Customary, & Continuous manner in which the regulated entity performed its maritime business with the general public, i.e. the regulated entity's "practice(s)"; (iv) such practice was unjust or unreasonable as determined by some relevant standard, such as "the commerce of the United States was being deterred" or by reference to established maritime standards, duties, or proscriptions. All four elements must be established to prove a violation of Section 10(d)(1) of the 84 Act.

over to the new majority position, summarized as:

> "Hapag . . . failed to observe its own established regulation and practice of not loading damaged containers. A single failure is still a failure and thus a violation of section 10(d)(1) regardless of whether there was only one failure or whether the single failure is a part

> of a sequence of failures or multiple failures."

Kobel, 32 SRR at 1736.

> "We believe that Complainant's injury was caused by the dubious liquidation of Complainant's containers by ITLC and/or Limco."

Id. at 1738 (emphasis added).

> "If ITLC violated its fiduciary duty, then Complainants have established a violation of section 10(d)(1)."

Kobel, 33 SRR at 599.

> "[T]he evidence shows that Limco either did not establish or did not observe and enforce just and reasonable regulations and practices . . . An NVOCC [Limco] assumes responsibility for transportation of a [single] shipment.[94]

Id. at 604 (emphasis added).

> Limco agreed to transport Complainants' cargo to Complainants' agent in Poland. Limco failed to deliver the three liquidated containers to Complainants in Poland. An NVOCC's failure to fulfill its obligation constitutes a violation of section 10(d)(1). [citing *Houben, William Brewer*, and *Adair*]"

Id.

The majority has been united and consistent in refusing to articulate the experience that has taught the Commission that prior FMC and ICC case law was both wrong and was working harm

[94] 46 U.S.C. sec. 40102(6)(A) is the definition section of the 84 Act. It does not affirmatively assign a statutory duty or obligation on the common carrier.

under present conditions.[95] Likewise, the Commission has failed to provide "reasoned analysis,"[96] "compelling reasons,"[97] to "acknowledge and provide adequate explanation",[98] or provide "substantial evidence on the record" for the complete volte-face from prior section 10(d)(1) case law, as described above, to the new majority position in the case *sub judice* that a single failure by the common carrier is a violation of section 10(d)(1) of the 1984 Act. The burden is squarely on the Commission's shoulders to justify the diametrical conflict between *Baltimore & Ohio Railroad Company* (a 1923 ICC case), *Intercoastal Investigations, 1935*, (a _____ case), *Whitam v. Chicago R.I & P. Ry.* (a 1946 ICC case), *Altieri* (a 1962 FMC case), *McClure* (a964 case addressing a USDA regulation), *Stockton Elevators* (a 1964 FMC case), *Sea-Land Service* (formerly *Maritime Service*, a 1978 FMC case), *European Trade Specialists* (a 1979 FMC case), *A.N. Deringer* (a 1990 FMC case), *Kamara* (a 2001 FMC case), on one side, and the new majority's favored cases of *Adair* (1991 FMC case), *Tractor* (1992 FMC case), *Symington* (1993 FMC case), *Houben* (2010 FMC case), and the case *sub judice*, *Kobel*. The failure by the majority to provide such justification thereby relegates the Commission's actions to the status of arbitrary, capricious, and unlawful.

IX. Conclusion

The foregoing presents the purpose, text, legislative and judicial history, and the structure and statutory scheme of the 1984 Act and Section 10(d)(1) thereof. The majority's construction of Section 10(d)(1) does not withstand the examination required by "Step One" of *Chevron*. In determining whether the statute is ambiguous or whether Congress has spoken to the issue in question, the majority's position is on the wrong side of numerous traditional canons of

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[95] See *Harrington & Co and Palmetto Shipping & Stevedore v. Georgia Port Authority*, 23 SRR 753 (ID 1986).
[96] See *State Farm Insurance*, 463 U.S. 29 (1983).
[97] See *Harrington*, 23 SRR 753 (ID 1986).
[98] See *Jicarilla Apache Nation v. United States Department of the Interior*, 613 F.3d 1112, 1119-1120 (D.C. Ct. App. 2010).

statutory construction, including:

- Syntactic Canon
- Ordinary Meaning Canon
- Whole Text Canon
- Associated Words Canon
- Prior Construction Canon
- Presumption of Consistent Usage Canon
- Negative Implication Canon
- Presumption Against Extraterritorial Application Canon
- Surplusage Canon

Further, the majority maintains its position in complete disregard of its burden and duty as set forth under the doctrine of federal agency *stare decisis*. A casual observer could conclude the majority's arguments concerning its statutory construction were not intended to bring either logic or illumination to the matter, but rather to repeatedly circle, confuse, and ultimately exhaust any inquirer. Consider:

> [The] ALJ determined that while Limco had a just and reasonable practice of changing bills of lading at the request of a freight forwarder, Limco should not have followed the general practice "under these facts" because Limco knew or had reason to know that ILTC was acting contrary to Complainants' interest. . . If it was Limco's practice to blindly follow a freight forwarder's request to change bills of lading when Limco knew or had reason to know that the freight forwarder was acting adversely to its shipper's interest, Limco's practice was not just and reasonable. If, on the other hand, it was Limco's practice to contact its shipper when Limco knew or had reason to know that the freight forwarder was acting adversely to its shipper's interest, Limco failed to observe and enforce this practice with respect to Complainants' shipments. Either way, Limco failed to establish, observe, and enforce just and reasonable regulations and practices with respect to Complainants'

> containers as required under section 10(d)(1) of the Shipping Act, and thus it violated section 10(d)(1).

Order Affirming Remand Initial Decision, at 10-11.

Captain John Yossarian would give two full whistles to this formulation of Section 10(d)(1) and Joseph Heller could not improve upon the majority's logical construction.[99]

The majority concludes that "[t]o require claimants to make a showing (of 'a failure to establish, observe, and enforce a reasonable practice') would render the prohibition of section 10(d)(1) virtually meaningless." On the contrary, requiring claimants to plead and prove a failure *by the respondents* to "establish, observe, and enforce reasonable *practices*," gives section 10(d)(1) its proper scope and purpose as Congress intended under the Shipping Act – to protect the commerce of the United States from unreasonable practices of regulated entities. Section 10(d)(1) of the Shipping Act is not a duplicative, redundant, and more generous relief for "garden variety" maritime causes of action addressed by Congress in other statutes, in general maritime law, or in common law.

The Commission has expressed, *sub silentio*, the desire to offer assistance to property owners who have difficulties and suffer losses in the movement of their cargo in international waterborne commerce. As has been often noted, the pathway to purgatory and a lower, warmer region is paved with the bricks of good intentions. The Securities and Exchange Commission (SEC) interpreted a section of its statute[100] so as to broadly capture all nature of problems in the securities marketplace. In *SEC v. Sloan*, 436 U.S. 103 (1978), the U.S. Supreme Court pointedly rejected the agency's argument with the following comment:

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[99] I have noted in previous dissents that the majority's construction of Section 10(d)(1) is functionally equivalent to strict liability in that the only way to avoid liability under the section is the prompt, timely delivery of the container without any damage or commercial disruption.

[100] Securities Exchange Act of 1934, Ch. 404, 48 Stat. 881.

> Even assuming; however, that a totally satisfactory remedy – at least from the Commission's viewpoint – is not available in every instance in which the Commission would like a remedy, we would not be inclined to read Section 12(k) more broadly than its language and the statutory scheme reasonably permit. Indeed, the Commission's argument amounts to little more than the notion that Section 12(k) *ought* to be a panacea for every type of problem which may beset the marketplace.

Id. at 116 (emphasis in the original).

To express the Court's concern and holding in relation to the case *sub judice* and the current line of cases cited in the preamble to this dissent, the Commission should not look to Section 10(d)(1) as the *panacea* for every problem or grievance that arises in the maritime realm of receiving, handling, storing, or delivering property. Moreover, it is not as though claimants would be adrift without any remedy. Several of the cases cited herein clearly document that the claimants would have full and adequate remedies under numerous legal proscription including common law, state statutes, admiralty law, and, should be presented to proper courts of common pleas. Further, in several cases, the claimant could have received full remedy at the Commission under other specific sections of the 1984 Act.

The Court of Appeals for the District of Columbia Circuit's holding in *Loving* framed the proper application of *Chevron, Pharmaceutical Research,* and *City of Arlington* as follows:

> In determining whether a statute is ambiguous and in ultimately determining whether the agency's interpretation is permissible or instead is foreclosed by the statute, we must employ all the tools of statutory interpretation, including "text, structure, purpose, and legislative history."

Loving, 742 F.3d at 1016 (internal cites omitted).

The majority's glib dismissal of the dissent's discussion of "all sorts of statutes other than the Shipping Act" - and the majority's inability to understand what it describes as the dissent's "quixotic fixation on the word 'practice'" - entirely misses the point of the discussion. These other statutes, contemporaneous with the enactment of the Shipping Act, clearly demonstrate that Congress knew *exactly* what it was doing in using the phrase "establish, observe, and enforce just and reasonable regulations and practices - and what those words meant. Notwithstanding the efforts of the majority to doggedly portray the phrase and the term "practice" as ambiguous, this statutory language was not ambiguous when enacted by Congress and is not ambiguous now for anyone willing to fairly utilize established tools and canons of interpretation to delve into the statute's purpose, legislative history, and established judicial interpretation.

The foregoing dissenting discussion and analysis more than amply shows that Section 10(d)(1) was not ambiguous for near one century, and is not ambiguous today. Proper consideration and application of the nine canons of statutory construction discussed above demonstrates that Congress has spoken to the issue at hand and has spoken "univocally".[101] Therefore, we may comfortably stop the inquiry at the *Chevron* Step One stage. We never get to the *Chevron* Step Two stage – a destination that the majority so assiduously strives for in order to claim an ambiguity in the language of the statute. However, if a "doubting Thomas" remains unconvinced, then the agency's interpretation of Section 10(d)(1) is still not permissible because its interpretation is unreasonable in light of the proper application of the tools of statutory interpretation discussed *supra*. Further, the failure by the Commission to observe and follow the requirements of the doctrine of federal agency *stare decisis*, as discussed above, condemns the majority's order and decision to be improper and unlawful.

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[101] See *Bell Atlantic Telephone Companies v. Federal Communications Commission*, 131 F.3d 1044 (D.C. Ct. App. 1997)("Context serves an especially important role in textual analysis of a statute when Congress has not expressed itself as univocally as might be wished." *Id.* at 1047.

To frame this proceeding into some relative commercial perspective, consider the fact that in the year of the complaint's filing, Hapag-Lloyd was ranked as the 6th largest container carrier in the world[102] and transported over two million nine hundred thousand containers on a global basis.[103] The entire record evidence in this proceeding indicates that Hapag-Lloyd inadvertently mishandled *one* container and thereby violated Section 10(d)(1) of the 1984 Shipping Act.

As for the larger maritime U.S. regulated community that comprises some 177 vessel-operating common carriers, 6,086 ocean transportation intermediaries, and 263 marine terminal operators on the West, East, and Gulf coasts who handled 31 million twenty-foot equivalent containers of cargo in 2014, representing almost a trillion dollars or 56.1 percent of the value of America's total waterborne import and export commerce – they are facing a new and intrusive regulatory regime that has no discernible navigation buoys or boundary limits – and administered exclusively by the Federal Maritime Commission[104] if the majority position is allowed to prevail. To paraphrase the *Loving* Court's ultimate holding – it is my view that the Commission may not unilaterally expand its authority through such an expansive, atextual, and ahistorical reading of Section 10(d)(1) of the 1984 Act.

By reason of the foregoing discussion and analysis; I respectfully dissent from the majority order and decision.

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[102] *Alphaliner Monthly Monitor*, September, 2010, at 11.

[103] In its 2010 *Annual Reports*, Hapag-Lloyd reported it transported 4,947,000 TEUs (twenty foot equivalent units) in 2010. The industry standard for conversion of a "TEU" to actual containers, many of which are forty feet in length, is a factor of 1.7. Therefore, Hapag-Lloyd transported approximately 2,910,000 containers globally in 2010.

[104] Under traditional doctrine requiring exhaustion of administrative remedies and exclusive agency jurisdiction, once a matter is filed at the Commission, and it falls within the jurisdiction of the Shipping Act, then the respondent party cannot remove the matter to a state or federal court.